IN THE MATTER OF

MASSACHUSETTS BOARD OF REGISTRATION IN OPTOMETRY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico* and *Steven H. Goldberg, Assistant Attorneys General,* Boston, MA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Respondent

1. Respondent Massachusetts Board of Registration in Optometry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts (Mass. Gen. Laws Ann. ch. 13 §§16 *et seq.* and ch. 112 §§66 *et seq.*), with its principal office at 100 Cambridge Street, Boston, MA. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

2. The Board is composed of four optometrists and one public member, as provided in Mass. Gen. Laws Ann. ch. 13 §16.

3. While serving their membership terms, optometrist members of the Board may, and do, continue to engage in the business of providing

optometric services for a fee. Compensation for serving on the Board is limited to five hundred seventy-five dollars per year plus necessary traveling expenses for carrying out the business of the Board, and is paid out of fees collected by the Board. [2]

4. The Governor of the Commonwealth of Massachusetts appoints the four optometrist members and the public member of the Board.

5. The Board is the sole licensing authority for optometrists in Massachusetts. It is unlawful for an individual to practice or to offer to practice optometry in Massachusetts unless he or she holds a current license to practice issued by the Board.

6. The Board is authorized by Massachusetts law, Mass. Gen. Laws Ann. ch. 112 §71, to take disciplinary action against any licensee who engages in unprofessional conduct, fraud, deceit or misrepresentation in practice or in advertising, or who violates any rule or regulation promulgated by the Board pursuant to Mass. Gen. Laws Ann. ch. 112 §67. Disciplinary action by the Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

7. Board actions pertaining to optometrists in the Commonwealth of Massachusetts are decided by the four optometrist Board members, each of whose principal occupation is the private practice of optometry, and the public member.

Trade and Commerce

8. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, optometrists in Massachusetts compete with each other and with optometrists serving on the Board.

9. There are more than 1300 optometrists practicing in Massachusetts. More than $100 million are spent on eye care annually in Massachusetts by Massachusetts residents, governmental entities, and private third-party payers.

10. In the conduct of their businesses, optometrists in Massachusetts receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering eye care services, purchase and use supplies and equipment that are shipped across state lines, and engage in business with optical establishments that conduct business throughout the United States. The acts and practices described below are in interstate commerce, or affect the interstate activities of optometrists in Massachusetts and third parties who pay for eye services, and are in or affect commerce within the meaning of Sections 4 and 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a)(1). [3]

State Regulation of Optometry

11. With the exception of a statute barring claims that eyes are examined for free, the Commonwealth of Massachusetts does not, by statute or otherwise, ban or have any policy of banning truthful discount advertising by optometrists, truthful advertising about the goods and services that optometrists offer, or any other truthful advertising by optometrists.

Board Conduct

12. The Board has restrained competition among optometrists in Massachusetts by combining or conspiring with its members or others, or by acting as a combination of its members or others, to unreasonably restrict truthful advertising by optometrists. In particular:

a. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from truthfully advertising discounts from their usual prices and fees;

b. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and

c. Since at least October 1984, the Board has combined or conspired to prohibit optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

13. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. Since at least January 1981, the Board has prohibited advertising by optometrists of discounts from their usual prices and fees, without regard to the truth or falsity of such advertising, on the purported ground that such advertising violates Board regulations and a Massachusetts statute that bars the use of words or phrases that convey the impression that eyes are examined for free (Mass. Gen. Laws Ann. ch. 112 §73A); [4]

b. Since at least January 1981, the Board has prohibited optometrists from permitting optical establishments and other commercial practices to advertise the optometrists' names or professional abilities, without regard to the truth or falsity of such advertising;

c. Since at least January 1981, the Board has coerced and intimidated optometrists into not advertising discounts from their usual prices and fees and into not permitting optical establishments or other commercial practices to advertise their names or the availability of their

services, by using one or more of the following practices: (i) sending investigators to interrogate them and inform them that such practices were improper; (ii) demanding their attendance at informal meetings at which the Board instructed them to cease such conduct because it violated Board regulations and state law; (iii) threatening to bring disciplinary action against them unless they ceased such conduct; and (iv) bringing disciplinary action against them for engaging in such conduct;

d. In October 1984, the Board promulgated and implemented regulations that prohibit advertising by optometrists that offers gratuitous services, rebates, discounts, refunds, or otherwise for the purpose of increasing the number of private patients, without regard to the truth or falsity of the advertising;

e. In October 1984, the Board promulgated and implemented regulations that prohibit advertising that contains testimonials or that is "sensational" or "flamboyant"; and

f. In October 1984, the Board promulgated and implemented regulations that prohibit optometrists from permitting or authorizing optical establishments or businesses to advertise or publicize the optometrists' names or the availability of their services. [5]

Effects

14. The effects of the combination or conspiracy and the acts or practices described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

a. Consumers are being deprived of truthful information about optometrists' services, prices, and fees, such as information about optometrists' offering of discounts to the elderly or others;

b. Consumers are being deprived of the benefits of vigorous price and service competition among optometrists;

c. Consumers are being deprived of truthful information about the availability and convenient location of optometrists' services, such as information that optometrists are located adjacent to optical establishments;

d. Optometrists are being prevented from disseminating truthful information about their prices and fees, and are being prevented from permitting optical establishments and other commercial practices to truthfully advertise or publicize their names or the availability of their services; and

e. Some consumers have paid higher prices for optometric services, some consumers have delayed or forgone needed optometric services, and some consumers have bought optometric services that are less

desirable to them than the services they would have purchased in the absence of the combination, conspiracy, acts, and practices.

Violation

15. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy and these acts or practices are continuing and will continue unless the Commission enters appropriate relief against the Board.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JUNE 20, 1986

PRELIMINARY STATEMENT

The complaint in this case was issued on July 8, 1985. It charges that the respondent Massachusetts Board of Registration in Optometry ("the Board") has engaged in unfair methods of competition and unfair acts and practices in violation of Section 5 of the FTC Act (15 U.S.C. 45) and that these acts and practices are in or affect commerce.

The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by combining or conspiring with some of its members to unreasonably restrict truthful advertising by optometrists by: prohibiting optometrists from truthfully advertising discounts from their usual prices and fees; prohibiting optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

The complaint further alleges that the effect or tendency of the combination or conspiracy has been to restrain competition unreasonably and to injure consumers by:

(1) depriving consumers of truthful information about optometrists' service, prices, and fees;

(2) depriving consumers of the benefits of vigorous price and service competition among optometrists;

(3) preventing optometrists from disseminating truthful information about prices and fees; and

(4) preventing optometrists from permitting commercial establishments to truthfully advertise or publicize their names or the availability of their services. [2]

On August 27, 1985, the Board filed an answer denying the allegations and asserting as affirmative defenses that it is not a "person, partnership or corporation" under Section 5 and that the state action doctrine immunized its conduct.

The Board moved for summary dismissal or summary disposition of the complaint on October 31, 1985, arguing that the Federal Trade Commission lacks jurisdiction in this proceeding because (1) the Board is exempt from antitrust action under the state action doctrine; and (2) the Board is not a "person, partnership or corporation" subject to the Federal Trade Commission Act. The motion was denied on November 19, 1985.

On January 10, 1986, the Board moved for dismissal or summary disposition claiming that the Board has not acted as a combination or conspiracy and for partial summary disposition claiming that adoption of regulations in November, 1985, moots this proceeding concerning those regulations that respondent had changed. After oral argument the motion was denied on February 10, 1986.

Adjudicative hearings commenced in Boston, Massachusetts on February 10, 1986. On February 27, 1986 the Board moved to dismiss based on *Fisher v. City of Berkeley,* 106 S.Ct. 1045 (decided February 26, 1986). Counsel for the parties filed briefs and oral argument was heard, and the motion was denied on March 27, 1986.

On March 27, 1986, the record was closed. [3]

I. Findings of Fact

A. The Respondent

1. Massachusetts Board of Registration in Optometry

1. The respondent Board is a state agency that regulates the practice of optometry in Massachusetts. (F 2–13; Stip.).[1]

2. The Board is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts. Mass. Gen. Laws Ann. ch. 13, §§ 16–18, ch. 112, § 61 and ch. 112, §§ 66–73B (Complaint ¶1; Answer ¶1; CX 16A to C; CX 17; and CX 18A to S).

3. The Board consists of five members, four of whom are optometrists and the fifth is a public member. (Complaint ¶2; Answer ¶2; CX–16–A). The public member of the Board has not participated in

[1] "F" means finding; "Stip." means stipulated (see addendum to respondent's proposed findings); "CX" means Commission exhibit; "RX" means respondent's exhibit; "TR" means transcript. References to the transcript are usually by the name of the witness followed by the page number.

any Board activities since December, 1982. (CX 81A; CX 90B; CX 242 at 18–19).

4. While on the Board, optometrist members continue to provide optometric services for a fee. (Complaint ¶2; Answer ¶2). The compensation for serving on the Board is five hundred seventy-five dollars per year, plus necessary travel expenses for carrying out the business of the Board. (CX 16C; Stip.).

5. All Board decisions are by a majority vote of its members. (CX 242 at 20). The Board members choose a chairman and secretary by majority vote. (*Id.*). The chairman and secretary serve for one year terms. (CX 16C). The responsibilities of the chairman include interpretation of Massachusetts statutes and Board regulations governing the practice of optometry. (DiGregorio 630–631).

6. Dr. DiGregorio was chairman from 1977 to 1981 (DiGregorio 630); Dr. Wagner chaired the Board from 1981 to 1982 (CX 69A); Dr. Exford chaired the Board from 1982 to 1983 (Exford 449); and Dr. Rapoport succeeded Dr. Exford and is the current chairman (CX 89A; CX 94A; Rapoport 515). At all times relevant to the complaint, the secretary has been an optometrist: Dr. Exford was secretary from 1977 to 1982 (Exford 449); Dr. Rapoport was secretary from 1982 to 1983 (CX 79A); Dr. Lamont was secretary from September, 1983, to September, 1985 (CX–242 at 16); and Dr. Oliver is the current secretary. (RX 27A) (Stip.). [4]

7. The practice of optometry in Massachusetts is governed by statutes enacted by the legislature and by regulations promulgated by the Board. (Stip.).

8. Massachusetts statutes define the practice of optometry. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). Massachusetts statutes require that anyone who practices optometry be licensed by the Board. Mass. Gen. Laws Ann. ch. 112, § 68. (CX 18E, 18F; CX 2B).

9. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 67, to promulgate rules and regulations governing the practice of optometry. (CX 18C). Optometrists who engage in the practice of optometry in Massachusetts are required to comply with regulations promulgated by the Board. (CX 2B).

10. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 61 and § 71 to revoke or suspend the license of any optometrist for professional actions that constitute unprofessional conduct, gross misconduct or incompetence, and malpractice. (CX 17; CX 18K). The Board is authorized to take the same actions for violations of any rule or regulation promulgated by the Board (CX 17; CX 18K). Under Mass. Gen. Laws Ann. ch. 112, § 72A, the Board may seek criminal sanctions including fines and imprisonment for violations of its rules and regulations. (CX 17; CX 18M; Stip.). The Board holds hearings to

determine the technical competence of optometrists who may be seeing too many patients. (CX 61–62).

11. Massachusetts law limits the authority of the Board to restrict truthful advertising. (CX 17). Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that:

> [e]xcept as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain or lessen competition.

In promulgating Section 61, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy. [5]

12. The only restriction on truthful advertising by optometrists is Mass. Gen. Laws Ann. ch. 112, § 73A (CX 18P):

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any newspaper, radio, display sign or other advertisements any statement of a character tending to deceive or mislead the public, or any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes," "free advice," "free consultation," "consultation without obligation," or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

13. The Board is not supervised by any other branch of Massachusetts state government. (CX 5U). While the Board falls within the Division of Registration and the Executive Office of Consumer Affairs, these offices have only advisory power. (*Id.*) (Stip.).

2. Board Procedures

a. Enforcement of Regulations

14. After receipt of a complaint, the Board writes a letter or places a telephone call to the subject of the complaint. (CX 242 at 66; F 118, 127–29).

15. If the complaint is not resolved, the optometrist is invited to attend an informal conference. (CX 242 at 66–67) (Stip.).

16. Complaints that are not resolved informally are resolved at a

formal hearing at which witnesses are sworn and testimony is transcribed. (*Id.* at 67) (Stip.). [6]

17. Most complaints are resolved informally. (CX 241 at 57; Exford 467–68) (Stip.).

18. None of the enforcement actions involving discount or affiliation advertising on this record has involved a formal hearing. (F 116–32, Stip.).

b. Interpretation of Regulations

19. The Board has interpreted Massachusetts statutes and regulations. (DiGregorio 631–37, 651–52; CX 67B). The Board does not distribute interpretations of its regulations to optometrists in Massachusetts. (Rapoport 529–30).

20. The Board has issued no interpretations regarding its current regulations. (Rapoport 538; CX 246 at 30–33) (Stip.).

3. The Optometrist Members of the Board

21. The optometrist members of the Board do not advertise, participate in referral relationships with opticians or optical establishments, or offer discounts. (F 22–33).

22. Haskell I. Rapoport, O.D., has been a member of the Board from about October 1980 to the present. (CX 5A); Rapoport 514–15). While on the Board, Dr. Rapoport's primary source of income has been the private practice of optometry as a solo practitioner. (Rapoport 515–16) (Stip.).

23. Dr. Rapoport has not advertised except by permitting his name to be used in professional listings in high school programs and through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He acquires patients by word-of-mouth referrals. (Rapoport 517). He does not offer discounts to obtain patients. (*Id.* at 518) (Stip.).

24. Alton W. Lamont, O.D., has been a member of the Board from about November, 1981, to the present. (CX 5A–B). While on the Board, Dr. Lamont's primary source of income has been his practice of optometry as a solo practitioner. (CX 242 at 6–8) (Stip.).

25. Dr. Lamont has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He relies on word-of-mouth referrals to attract patients. (CX 242 at 9–10). Dr. Lamont does not offer discounts. (*Id.* at 10–11) (Stip.). He competes with chain optical establishments as well as other optometrists. (CX 242 at 13–14; Feldman 375).

26. Jon Volovick, O.D., has been a member of the Board from about November, 1983, to the present. (CX 5B). While on the Board, Dr.

Volovick's primary source of income has been his [7] practice of optometry as a solo practitioner. (CX 241 at 7–10) (Stip.).

27. Dr. Volovick has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). Dr. Volovick does not offer discounts. (CX 241 at 16–17) (Stip.).

28. Frederick J. Wagner, O.D., was a member of the Board from 1959 to July, 1985. (CX 240 at 4–5; CX 5B) (Stip.).

29. Dr. Wagner has never advertised except to list his name in the Yellow Pages. (CX 240 at 40–41). Dr. Wagner relies on word-of-mouth referrals to attract patients. (CX 240 at 41–42). He has never offered discounts to customers. (CX 240 at 41) (Stip.).

30. Dr. Joan Exford, O.D., who is also sometimes referred by her married name, Dr. Korb (Exford 448–49), was a member of the Board from about May, 1976, through December, 1983. (CX 5B). Dr. Exford does not advertise to obtain new patients. (Exford 470) (Stip.).

31. Dr. Leonard DiGregorio, O.D., was a member of the Board from 1966 to 1981. (DiGregorio 629–30). During Dr. DiGregorio's term on the Board, the practice of optometry was his primary source of income. (*Id.*).

32. Dr. DiGregorio has never engaged in paid advertising (*id.* at 643–44), nor has he ever offered discounts to attract patients. (*Id.* at 643). However, Dr. DiGregorio has participated in various community activities to "let people know what you do." (*Id.* at 644). Dr. DiGregorio also relies on word-of-mouth referrals to attract patients. (*Id.* at 643).

33. Paul Oliver, O.D., has been a member of the Board from July, 1985, to the present. (CX 101A). Dr. Oliver is in a solo practice. Dr. Oliver does not advertise. (CX 5B) (Stip.).

34. Board members believe that advertising, offering discounts, or affiliating in referral arrangements with optical establishments is inconsistent with optometry's status as a learned profession. (F 35–40, 83).

35. The Board considers the practice of optometry to be a learned profession. (CX 261 at 34; Volovick 662, 670).

36. The Board has distinguished the practice of optometry from the practice of opticianry on the ground that "[o]pticianry is a trade and not a profession." (CX 261 at 35) (Stip.).

37. The optometrists on the Board do not advertise. (F 23, 25, 27, 29–30, 32–33) (Stip.). [8]

38. The Board considers discount advertising between optometrists and non-optometrists to be inherently deceptive. (CX 7B).

39. The Board considers advertising affiliations between optome-

trists and non-optometrists ("affiliation advertising") to be inherently deceptive. (CX 7D).

40. The optometrists on the Board do not offer discounts to attract patients. (F 23, 25, 27, 29, 30, 32) (Stip.).

B. The Market

1. Types of Practice

41. Three professional groups provide eyecare: ophthalmologists, optometrists, and opticians. (F 42–54) (Stip.).

42. An ophthalmologist is a physician who has served a residency in ophthalmology. (Exford 508). An ophthalmologist examines eyes and prescribes eyeglasses and contact lenses, but primarily treats the eye for diseases and performs surgery. (*Id.* at 508; Collinson 362). Ophthalmologists are regulated by the Massachusetts Board of Registration in Medicine. (Exford 499–500). Ophthalmologists are permitted to advertise discounts and affiliations with non-ophthalmologists. (CX 327Z at 24) (Stip.).

43. Optometrists are authorized to diagnose, by any means except drugs, deficiencies in the human eye and prescribe corrective lenses. They may not diagnose or treat eye diseases. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). In addition to prescribing lenses, optometrists sell and fit glasses and contact lenses. (CX 261 at 36; *See e.g.,* DiGregorio 628–29). Optometrists attend a college of optometry and must pass an examination administered by the Board. (Exford 508; CX 18E).

44. Opticians are authorized to prepare and sell eyeglasses and contact lenses based upon prescriptions from an optometrist or ophthalmologist. Mass. Gen. Laws Ann. ch. 112, § 73C. (CX 18S, 18T). In this respect, opticians are analogous to a pharmacist who fills drug prescriptions. (Convissar 207). They may not prescribe lenses or diagnose or treat eye diseases or deficiencies. (CX 18S; 18T).

45. Opticians are regulated by the Massachusetts Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U; Collinson 362–63). No person can engage in the practice of opticianry unless the person has a license granted by the Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U) (Stip.). [**9**]

46. Opticians receive their training either by participating in a three year apprenticeship or by attending opticianry school. (Collinson 363; Kahn 549) (Stip.).

47. The Board of Registration of Dispensing Opticians has never received a deceptive advertising complaint against a chain. (Collinson at 365) (Stip.).

48. Opticians and optometrists may work together or in affiliation, but the optometrist must practice in a "separate premises" from the optician. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

49. A "separate premises" for this purpose is defined by Massachusetts law as "any room, suite of rooms or an area which optometry is practiced shall be considered separate premises if it has a separate and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

50. The optometrist may not share, directly or indirectly, with an optician "any fees received in connection with said practice of optometry." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

51. A Pearle Vision Center is a chain of retail stores each with an optical dispensary selling optical goods and with an adjacent optometrist's office. (Kahn 553, 554). There is a separate entrance into the optometrist's office from the outside, as well as a sliding glass door between the optometrist's office and the Pearle Vision Center. (*Id.* at 555). The office space is subleased by Pearle to an optometrist. (*Id.* at 554). The lease arrangement constitutes the only financial arrangement between the optometrist and Pearle. (*Id.* at 556).

52. Pearle exercises no control over the optometrist. (Kahn 556). The rent paid by the optometrist is not based on the number of patients the optometrist sees. (*Id.* at 558). Patients pay the optometrist directly for the examination and the optometrist owns the patients' records. (*Id.*).

53. Massachusetts law requires that optometrists display their license in a conspicuous place and provide each patient with a memorandum of sale with the optometrist's name, address, and license numbers. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I, 18J).

54. The relationship between Pearle and the optometrists with whom it affiliates is similar to the relationship between other chains optical establishments and optometrists. (Convissar 209–11; Rymeski 238–40, 242–43; Feldman 381–87). **[10]**

2. Size of Market

55. As of September 10, 1985, there were 1894 optometrists holding a valid license to practice optometry in Massachusetts and, of these, 1355 were in active practice. (CX 5F). More than $100 million is spent on eyecare annually in Massachusetts. (Complaint ¶9; Answer ¶9) (Stip.).

3. Interstate Commerce

56. The Board's actions to prohibit truthful advertising by optometrists have a substantial effect on interstate commerce. (F 57–59).

57. The practice of optometry by licensed optometrists in the Commonwealth of Massachusetts is in interstate commerce. (CX 8) (Stip.).

58. The Board, through its restrictions on truthful advertising, has inhibited the ability of interstate optical firms affiliated with Massachusetts optometrists to compete in the market for optical goods and services in Massachusetts. (F 74–76, 78–79). The Board has prevented interstate firms such as American Vision Centers, Sterling Optical, Eye World, and Pearle Vision from engaging in affiliation advertising. (F 74–76, 141–42, 145–46). The Board has discouraged Massachusetts optometrists from advertising their affiliation with Eye World. (F 146). American Vision Centers, which has plans to expand its operations in seven of the nine states in which it operates, is not expanding its operations in Massachusetts because of the Board's restriction on affiliation advertising. (F 79).

59. The restrictions imposed by the Board on price and non-price advertising are likely to raise the price of and restrict access to optometric goods and services in the Commonwealth of Massachusetts, which are in interstate commerce. (F 57–58, 62).

4. Advertising and Competition

60. Advertising lowers out-of-pocket and search costs to consumers. (Kwoka 695–98). The total cost to consumers of purchasing a good or service includes: the price, which is the out-of-pocket cost paid directly to the seller, and the search cost to obtain information necessary to make a buying decision, including the time and expense of travel. (Kwoka 695–96) (Stip.).

61. Advertising is a form of competition like price competition. (Kwoka 698). Advertising may benefit sellers by attracting customers, by facilitating seller's entry into a market or by making possible the expansion of goods and service sold by the seller. (*Id.*). [11]

62. Restrictions on advertising in the market for optometrist goods and services raise prices and total cost to consumers without affecting quality. (Kwoka 712).

63. Dr. Kwoka is one of four authors of the "Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry," also known as the "B.E. Study," which was published in 1980. (CX 318; Kwoka 711–13, 751–52) (Stip.).

64. The B.E. Study examined the contention that advertising has detrimental effects on quality of professional services. (Kwoka 712).

65. The B.E. Study confirms the economic prediction that advertis-

ing has the effect of lowering the total cost of optometric goods and services. (Kwoka 722–24, 729–30; CX 319–20).

66. The B.E. Study shows that advertising did not lead to any significant deterioration in quality. (Kwoka 735–36, 748–49). The B.E. Study shows that, on average, less thorough eye examinations tend to be given by advertising optometrists than by nonadvertising optometrists. (CX 318 at 13; Kwoka 386–89). However, in markets where advertising is allowed, 55% of the optometrists do not advertise and a higher percentage of all optometrists give high quality examinations than in markets where advertising is prohibited. (CX 318 at 13–14).

67. Dr. Edelstein, a licensed optometrist in Massachusetts, advertises primarily through direct mail coupons that offer a $20.00 discount on the fee for a complete pair of prescription eyeglasses. (Edelstein 283–84).

68. Since Dr. Edelstein began advertising discounts, his practice has grown. (*Id.* at 286–87). Dr. Edelstein saw two patients per week when he first began to practice. He now sees over 100 patients per week. (*Id.* at 288–89). The annual income of Dr. Edelstein's practice greatly increased. (*Id.* at 286–87).

69. Without volume, Dr. Edelstein could not provide the services which he now makes available. (*Id.* at 287–88). Dr. Edelstein has over 1000 contact lenses in stock and 30,000 eyeglasses. (*Id.* at 275–76).

70. As a result of his discount advertising, Dr. Edelstein expanded the geographical area that he serves. Dr. Edelstein draws patients from Burlington and Lexington, Massachusetts, towns from which Dr. Volovick draws patients, and Newton, a town from which Dr. Lamont draws his patients. (*Id.* at 292–93; Volovick 660–61; CX 242 at 8–9).

71. Dr. Edelstein surveys competing optometrists to determine their prices. (Edelstein 279–80). Advertising [12] optometrists generally charge between $30.00 and $50.00 whereas non-advertising optometrists generally charge between $60.00 and $80.00. (*Id.* at 282).

72. His advertising made patients aware of his lower prices. (Edelstein 305–06, 289–91, 308–09).

73. Dr. Morton Ross, an optometrist, discontinued truthfully advertising discounts after being instructed to do so by the Board. (CX 29 at 10–11, ex. P) (Stip.).

74. Optical establishments compete by enabling consumers to purchase eyeglasses at the same location where they obtain their eye-examination. (Feldman 377–78). This is sometimes referred to as "one stop shopping." (*Id.*) (Stip.).

75. Pearle Vision Centers, which had not engaged in affiliation advertising because it was against Board regulations, changed its

policy 18 months ago. (Kahn 577–79). The number of patients coming to Pearle Vision Centers has increased significantly since Pearle began to advertise the availability of optometrists' services. (*Id.* at 581).

76. Consumers want to know about the availability of an optometrist and 80–99% of consumers purchase eyewear where they get their examination. (Kahn 582; Volovick 664). The increase in the number of patients coming to Pearle was the result of affiliation advertising. (*Id.* at 586–90; Rymeski 241).

77. Prices are lower for eye-examinations and for optical goods in states where advertising is permitted than they are in Massachusetts. (Convissar 218–26).

78. Optometrists affiliated with American Vision Centers charge less for eye-examinations in states where affiliation advertising is permitted. (*Id.* at 218–23):

States Restricting Affiliation Advertising	Eye Exams[2]	Daily Contacts	Extended Contacts
Texas	$35	$75	$100
Massachusetts	$30–40	$50–60	$80–100[13]

States Permitting Affiliation Advertising	Eye Exams	Daily Contacts	Extended Contacts
New York	$12–15	$35	$50
Illinois	$12–15	–	–
Missouri	$20	$35	$50
Pennsylvania[3]	$20	$35	$50

79. American Vision is planning to expand its operation in every state in which it operates, except Texas and Massachusetts, where it will not because of advertising restrictions. (Convissar 223–24).

C. The Board and Truthful Advertising

1. Prior to Bates

80. Prior to the Supreme Court decision in *Bates v. Arizona State Bar,* 433 U.S. 350 (1977), Rule 9 of the Board's regulations prohibited all advertising by optometrists. (DiGregorio 637–39).

2. The Board and Bates

81. In 1977, the Board became aware that the Supreme Court in *Bates* had struck down restrictions on truthful advertising. (DiGregorio 641–43). By 1979, the Board still limited "permissible advertis-

[2] Eye-examinations are conducted only by optometrists. (*Id.* at 221).

[3] The arrangement between American Vision and optometrists in Pennsylvania is similar to Massachusetts since the optometrists are independent of American Vision. (*Id.* at 221).

ing" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (CX 13I).

82. The Board prohibited affiliation advertising between optometrists and opticians in regulations that took effect on July 1, 1979. Section 3.08 of the Board's regulations prohibited any optometrists from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment." (CX 13H) (Stip.).

83. The Board prohibited advertising of discounts by optometrists in regulations that took effect on July 1, 1979. Section 3.12 of the Board's regulations prohibited any optometrist from "discriminating directly or indirectly in his professional services." (CX 13I). The Board interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. (CX 29 at 4, 6; CX 261 at 10–11). [14]

3. Criticism By the Office of Consumer Affairs

84. In 1981, the Massachusetts Executive Office of Consumer Affairs ("EOCA") criticized the Board's restrictions on truthful advertising as restraining trade and as contrary to the Supreme Court decision in *Bates*. (F 85–87).

85. The EOCA is a cabinet office whose area of responsibility includes the Board of Registration in Optometry. (Pollock 131, CX 19A to 19D; CX 20A). Although the Board is under the EOCA for organizational purposes, the EOCA does not have the authority to require the Board to modify its regulations. (CX 5U; CX 261 at 32).

86. By letter dated March 30, 1981, Eileen Schell, the Secretary of the EOCA, informed the Board that it should delete Section 3.08 because it constituted a restraint of trade and suggested that the Board delete advertising restrictions that were contrary to *Bates*. (CX 22A-B).

87. On May 13, 1981, Ruth Pollock, General Counsel to EOCA, notified the Board that several regulations including Sections 3.08 and 3.12 were unduly restrictive in light of *Bates*. (Pollock 140–43).

4. Criticism By the State Auditor

88. The Massachusetts Department of the State Auditor ("State Auditor") criticized the Board's restrictions on truthful advertising. (F 89–99).

89. The Department of the State Auditor is a state agency whose responsibility includes auditing state agencies to verify information contained in financial reports and to ensure that the state agencies are operating in accordance with state law. (Gallagher 157–60).

90. In 1982, the State Auditor conducted an audit of 15 of the 28

Boards of Registration in Massachusetts, including respondent, "to determine whether these boards have acted in the consumer's interest when administering the laws and regulations that they are required to enforce." (CX–261 at 1; Gallagher 160).

91. Frank Gallagher, the auditor from the Department of the State Auditor with primary responsibility for the audit of the Board, concluded after an initial review that many of the Board's regulations were contrary to the consumer interest. (Gallagher 166–70). These regulations included Sections 3.08 and 3.12. (*Id.* at 169–70). **[15]**

92. On June 29, 1983, the State Auditor submitted a draft copy of its report to the Board for comment. (CX 261 at 4). In the draft report, the State Auditor criticized numerous regulations promulgated by the Board, including Sections 3.08 and 3.12. (CX 261 at 34–36).

93. On August 22, 1983, the Board responded by letter to the draft report. (CX 261 at 34–38). The Board stated that Section 3.12 had been eliminated from revised regulations that the Board was preparing. (CX 261 at 36). The Board also objected "to time spent on matters which have become obsolete." (CX 261 at 37). The Board did not inform the State Auditor that its revised regulations, which the Board did not adopt until October, 1984, contained an explicit ban on discount advertising. (Exford 494–96) (Stip.).

94. The Board informed the State Auditor that it intended to retain Section 3.08 as Section 5.06. (CX 261 at 36). The Board stated that its ban on affiliation advertising was justified for the same reasons that justified restrictions on the ability of optometrists to affiliate with non-optometrists. (*Id.* at 14, 36). The Board asserted that restrictions on affiliation were necessary to protect consumers from "mercantile practices" which would result in "undue influence" on optometrists to prescribe unnecessary eyewear and result in lower quality eyecare by setting limits on the nature of an optometrist's practice or the time spent with a patient. (CX 261 at 34–36).

95. After receipt of comments, the State Auditor published a final report. (CX 261, Gallagher 193–94).

96. The State Auditor stated that Section 3.08 "had been implemented to prevent opticians and optometrists from forming business relationships." (CX 261 at 9). The State Auditor concluded that Section 3.08 was "unreasonable" and noted that the EOCA had recommended that "this restriction be discontinued because it unfairly restricts trade." (*Id.*).

97. The State Auditor concluded that the Board's concerns about mercantile practice did not justify retaining Section 3.08 in the Board's revised regulations, stating:

optometrists are expected to perform their function in a manner that provides profes-

sional care to the consumer. The board already assures this standard through its regulation on minimum vision analysis procedures and through its consumer complaint process. We believe that existing professional standards offer sufficient assurances [16] of an optometrist's conduct, regardless of whom the optometrist's employer might be.

(*Id.* at 14). The State Auditor recommended that the Board reevaluate Section 3.08. (*Id.* at 15).

98. The State Auditor stated the Board had used Section 3.12 not to protect consumers from higher prices, but to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees. (CX 261 at 10–11). The State Auditor concluded that (*id.*):

this regulation, does not benefit the consumer because it prevents optometrists from offering their consumers discounts.

99. The State Auditor reiterated the recommendation of the Executive Office of Consumer Affairs that, as a result of the *Bates* decision, " '[a]dvertising can be in any form as long as it is not deceptive or misleading.' " (CX 261 at 13). The State Auditor recommended that the Board (*id.*):

Modify or eliminate its regulations on advertising restrictions. This action should reflect EOCA's recommendation to eliminate advertising restrictions since such restrictions are contrary to a U.S. Supreme Court ruling on professional advertising in general.

5. 1984 Regulations

100. The Board adopted regulations on October 18, 1984 that contained explicit bans on truthful advertising that in some aspect were more restrictive than the Board's previous regulations. (F 101–03; CX 2D).

101. The Board retained its restriction on affiliation advertising in its 1984 regulations. (CX 14S). Section 5.07(3) of the Board's 1984 regulations states:

An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [*sic*] authorize an [17] optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

102. The Board added an explicit restriction on discount advertising in its 1984 regulations. (CX 14T). Section 5.11(1)(f) of the Board's 1984 regulations declares "[a]dvertising which offers gratuitous services,

rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients" to be contrary to the public interest. (*Id.*). Section 5.11(1)(f) expanded the Board's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. (CX 13I; CX 14T).

103. The Board added two other explicit restrictions on truthful advertising. (CX 14T). Section 5.11(1)(d) declared "advertising which uses testimonials" to be contrary to the public interest. (*Id.*). Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant." (*Id.*).

6. Federal Trade Commission Investigation

104. The Board became aware of the Federal Trade Commission's investigation in February, 1985. (CX 98B at 3; Rapoport 540–41) (Stip.).

7. Proposed 1985 Regulations

105. On June 27, 1985, the Board published a notice of proposed changes in its regulations in the Massachusetts Register. (CX 5X) (Stip.).

8. Federal Trade Commission Complaint

106. On July 8, 1985, the Federal Trade Commission issued a complaint challenging the Board's restrictions on truthful advertising. (Complaint ¶12, ¶13).

9. EOCA and the Proposed Changes

107. On July 28, 1985, Paula Gold, Secretary of Consumer Affairs and Business Regulation, testified before the Board concerning the Board's proposed changes that had been published on June 27. (CX 21A; CX 102A) (Stip.).

108. Ms. Gold criticized the Board's proposal to retain its restriction on affiliation advertising. (CX 21D-E). [18]

109. Ms. Gold stated that "there is no need for the Board to repeat—or expand" Section 73A's ban on free eye-examinations. (CX 21C).

10. November, 1985 Regulations

110. On November 7, 1985, the Board promulgated revised regulations. (CX 15A) (Stip.).

111. In its November, 1985, regulations, the Board continued to prohibit affiliation advertising. (CX 15A). Section 5.07(3) of the Board's 1985 regulations states that an optometrist "shall not permit or authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optome-

try." (*Id.*) In addition, the Board imposed a requirement that "[u]nauthorized advertising or publicizing of a licensee's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee." (*Id.*) (Stip.).

112. The Board's November, 1985, revised regulations deleted Section 5.11(1)(f), which banned discount advertising, Section 5.11(1)(d), which banned advertising that used testimonials, and Section 5.11(1)(a), which banned advertising that appeared to be "sensational" or "flamboyant." (CX 15B) (Stip.).

113. The revised regulations added Section 5.11(1)(b), which declares as not in the public interest "advertising which offers gratuitous services in violation of Mass. Gen. Laws Ann. ch. 112, § 73A" and Section 5.11(1)(c) "advertising which is not in accordance with applicable law, including, but not limited to, Mass. Gen. Laws Ann. ch. 112, § 73A . . . ." (CX 15B).

114. The revised regulations added Section 5.11(6), which states "[w]hen offering discount fees for services or materials usual and customary fees must be substantiated." (CX 15B) (Stip.).

115. The Board's amended regulations have not been distributed to optometrists in Massachusetts. (Rapoport 538; CX 325).

D. Restraint of Truthful Advertising

1. Discount Advertising

116. From 1981 to October, 1984, the Board interpreted Section 3.12 of its regulations, which prohibited any optometrist from "discriminating directly or indirectly in his professional services," to prohibit truthful advertising by optometrists of [**19**] discounts. (F 118–23). From October, 1984, to November, 1985, Section 5.11(1)(f) of the Board's regulations prohibited "advertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of patients." (F 124–32).

117. The Board enforced its regulations against ten optometrists who were truthfully advertising discounts for optometric goods or services. (CX–29 at 1–15; Edelstein 300–01). The Board instructed each optometrist to stop advertising. In no case did the Board have any information that the optometrist was not providing the discounts as advertised. (*Id.*).

118. In 1980 or 1981, Dr. Rapoport sent a letter to Dr. Michael Edelstein, stating that advertising that offered a $15.00 discount off the regular price of eyeglasses in the Boston Globe was illegal and instructing Dr. Edelstein to discontinue the advertisement. (Edelstein 300). Dr. Edelstein provided the discounts as advertised. (*Id.* at 300). When Dr. Edelstein asked Dr. Rapoport for an explanation as to why

the advertisement was illegal, Dr. Rapoport stated that the advertisement "discriminated" against anyone who did not have a coupon. (*Id.* at 300–01).

119. In October, 1981, the Board informed Dr. Dana Ricker that by advertising discounts to senior citizens, Dr. Ricker had violated Section 3.12. (CX 29 at 6–7). The Board instructed Dr. Ricker to discontinue advertising discounts. (*Id.*). Dr. Ricker complied with the Board's instruction. (*Id.*) (Stip.).

120. In December, 1981, the Board instructed Dr. Sheldon Strauss that by advertising 15% discounts on optometric goods, he had violated Section 3.12 and instructed Dr. Strauss to discontinue his advertising. (CX 29 at 4). Dr. Strauss complied with the Board's instruction. (*Id.*) (Stip.).

121. In September, 1984, Dr. Robert Golden, an optometrist, complained to the Board that Dr. Ronald Cline was advertising the availability of discounts to senior citizens and a 10% discount on a complete pair of glasses to patients who presented a copy of Dr. Cline's advertisement. (CX 29 at 13–15, ex. V). On September 26, 1984, the Board invited Dr. Cline to attend "an informal conference regarding your type of advertising." (CX 29, ex. W) (Stip.).

122. At an informal conference held on October 10, 1984, the Board informed Dr. Cline that his advertising violated Board regulations and instructed him to discontinue his advertising. (CX 29 at 14). Dr. Cline complied with the Board's instruction. (*Id.*) (Stip.). **[20]**

123. On May 22, 1984, Dr. Carmine Guida, Executive Director of the Massachusetts Society of Optometrists,[4] sent a letter to the Board with a coupon advertisement from Dr. Sheldon Strauss that offered "$20.00 off on a complete pair of glasses." (CX 29 at 5, ex. E, F). Dr. Guida's letter asked whether Dr. Strauss' coupon was "a proper form of advertising." (CX 29, ex. E). After the Board became aware that Dr. Strauss was distributing discount coupons, it informed him that his advertising violated Section 3.12 of the Board's regulations. (CX 29 at 5) (Stip.).

124. On October 3, 1984, the Board sent a letter to Dr. Strauss informing him that the discount coupons violated the Board's rules on advertising. (CX 29 at 5, ex. G). Dr. Strauss provided the discounts as advertised. (CX 29 at 5). On November 14, 1984, Dr. Strauss attended a meeting with the Board at which the Board informed him that Section 5.11(1)(f) prohibited advertising that offered discounts. (*Id.* at 6) (Stip.).

125. In October, 1984, after Dr. Monte Levin distributed coupons

[4] The Massachusetts Society of Optometrists (MSO) is a voluntary association of licensed optometrists. (Volovick 655). As of February 27, 1986, there were 658 members, about half of the optometrists in the state. (CX 325; CX 5F).

redeemable for $10.00 off the price of prescription eyewear, the Board informed him that advertising the availability of discounts through use of coupons violated Section 5.11(1)(f) of the Board's regulations. (CX 29 at 3). He agreed to stop. (CX 29, ex. D) (Stip.).

126. Professional Practice Builders is an advertising agency that does business with optical establishments. (Convissar 214–15). In November, 1984, the Board informed Professional Practice Builders that it was a violation of Section 5.11(1)(f) of the Board's regulations for optometrists to advertise discounts. (CX 29 at 2) (Stip.).

127. On November 26, 1984, the Board informed Dr. Morton Ross that by advertising a $25.00 discount on optometric services and optical goods, he was in violation of "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] . . . 'Advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29, ex. N). Section 5.11 is, in fact, a regulation promulgated by the Board rather than a Massachusetts statute. (Rapoport 533–34). Dr. Ross notified the Board by letter that he intended to comply with the Board's regulations. (CX 29, ex. O). **[21]**

128. On December 7, 1984, the Board informed Dr. James Freedman that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 11, ex. Q1–2, ex. R). Dr. Freedman discontinued advertising discounts. (CX 29 at 12, ex. S).

129. On December 7, 1984, the Board notified Dr. Thomas Anzaldi that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 13, ex. U). Dr. Anzaldi notified the Board that he would discontinue advertising discounts. (CX 29 at 13).

130. In February, 1985, the Board informed Dr. Jacob Bailen that advertising the availability of discounts to senior citizens violated Section 5.11(1)(f) of the Board regulations. (CX 29 at 2) (Stip.).

131. On May 1, 1985, the Board instructed its attorney and one of the investigators to compile lists of discount advertisers and to send letters to them. (CX 100B). The Board stated that "they will be asked to appear before the Board. If subsequent violations occur, criminal charges will be brought against them." (*Id.*).

132. In May 22, 1985, the Board mailed a "Notice of Informal Conference" concerning a violation of Section 5.11(1)(f) to Dr. Michael Edelstein. (CX 29 at 9, ex. L). The informal conference concerned discount coupons that Dr. Edelstein had distributed in Newton, the location of Dr. Lamont's practice. (Edelstein 302). At an "informal conference," held on June 12, 1985, the Board informed Dr. Edelstein that his use of discount coupons violated Section 5.11(1)(f) of the Board's regulations and instructed Dr. Edelstein to discontinue advertising the availability of discounts. (CX 29 at 9).

133. No evidence was introduced to show that the Board ever charged any optometrist with false or deceptive advertising.

2. Affiliation Advertising

134. In October, 1980, the Board informed Dr. Hong Ming Cheng that, by permitting Mass Optical Centers to advertise the availability of his services, he had violated Section 3.08 of the Board's regulations. The Board also notified Mass Optical Centers. (CX 29 at 22–23) (Stip.). [22]

135. Dr. Cheng agreed to instruct Mass Optical to remove the sign advertising the availability of his services and Mass Optical discontinued the advertising. (CX 29 at 23; CX 56) (Stip.).

136. After becoming aware, in October 1980, that A Touch of Glass had advertised the availability of the services of Dr. Kenneth Levine, the Board instructed Dr. Levine that it was a violation of Section 3.08 for Dr. Levine to permit A Touch of Glass to advertise his services. (CX 29 at 25–26). Dr. Levine instructed A Touch of Glass not to advertise the availability of his services. (*Id.* at 26) (Stip.).

137. In May, 1981, the Board instructed Dr. Michael McCarty that it was a violation of Section 3.08 for Dr. McCarty to permit Eye-Deal Vision Centers to advertise the availability of his services. (CX 29 at 36–37). Dr. McCarty instructed Eye-Deal Vision Centers to discontinue advertising the availability of his services and Eye-Deal discontinued the advertising. (*Id.* at 37) (Stip.).

138. After becoming aware, in September 1981, that Optical World had advertised the availability of the services of Dr. John Getter, the Board informed both Dr. Getter and Optical World that such advertising was illegal. Dr. Getter instructed Optical World to stop advertising the availability of his services and Optical World discontinued the advertising. (CX 29 at 30–31) (Stip.).

139. In July of 1982, the Board informed Dr. Leon Litman that the advertisement by an optician of Dr. Litman's services was false and fraudulent. (CX 29 at 33–34). Dr. Litman instructed the optician to stop advertising the availability of his services and the optician did so. (*Id.* at 34) (Stip.).

140. In August of 1982, the Board informed Dr. Charles McKervey too that it was a violation of the Board's regulations to permit Eye World to advertise the availability of his services. (CX 29 at 35–36). At the time of doing so, that Board had no information that any patient of Dr. McKervey's had complained that the advertisement by Eye World of Dr. McKervey's services was deceptive or misleading. (*Id.*) (Stip.).

141. In December 1982, the Board informed Dr. Stanley Glick that it was a violation of Section 3.08 for him to permit Eye World to advertise the availability of his services. (CX 29 at 38–39). Dr. Glick instructed Eye World to stop advertising the availability of his services and Eye World discontinued the advertising. (*Id.* at 38) (Stip.). **[23]**

142. After the Board became aware, in late December, 1982, that Sterling Optical had advertised the services of Dr. William Killilea, the Board informed Dr. Killilea that it was a violation of Section 3.08 for Sterling Optical to advertise the availability of Dr. Killilea's services. (CX 29 at 24–25). Both the Board and Dr. Killilea instructed Sterling Optical to stop advertising the availability of his services and Sterling Optical discontinued the advertisement. (*Id.* at 24–25) (Stip.).

143. On May 25, 1984, the Massachusetts Society of Optometrists wrote a letter to the Board complaining that Stoneham Optical was advertising the availability of the services of an optometrist. (CX 29 at 31–32, ex. 7). The Board informed Stoneham Optical that it was a violation of Board regulations and state law for Stoneham Optical to advertise the availability of eye-examinations. (*Id.*). Stoneham Optical discontinued advertising the availability of eye-examinations. (*Id.* at 32). At the time that the Board contacted Stoneham Optical, the Board had no information that indicated eye-examinations were being conducted by someone who was not an optometrist. (*Id.* at 32–33).

144. After the Board became aware, on or about June 13, 1984, that Opticians III had advertised the availability of the services of Dr. Gerald Fruitkin, the Board informed Dr. Fruitkin that it was a violation of Board regulations for him to permit Opticians III to advertise the availability of his services. (CX 29 at 28–29). Dr. Fruitkin instructed Opticians III to stop advertising the availability of his services. (*Id.* at 29) (Stip.).

145. After the Board became aware, in January, 1985, that American Vision Center was advertising the availability of optometrists' services, the Board contacted five optometrists whose services had been advertised by American Vision Centers. (CX 29 at 15–22). The Board informed the five optometrists, Dr. Christopher Joseph, Dr. Curtis Frank, Dr. Leon Fishlyn, Dr. Richard Jasiak, and Dr. Peter

Bridges that, by permitting American Vision Center to advertise the availability of their services, they were violating section 5.07(3) of the Board's regulations. (*Id.* at 15, 17–18, 20–21). Each of the optometrists instructed American Vision Center to stop advertising the availability of his services and American Vision Centers discontinued the advertising. (*Id.* at 16–21, ex. DD) (Stip.).

146. On January 9, 1985, the Board became aware that Eye World had advertised the availability of the services of Dr. Kendrik Krosschell. (CX 29 at 27). The Board informed Dr. Krosschell that it was a violation of Section 5.07(3) for him to permit Eye World to advertise the availability of its services. Dr. Krosschell instructed Eye World to stop advertising the [**24**] availability of his services and Eye World discontinued the advertising. (*Id.*).

3. Source of Complaints

147. The records of the Board contain no complaints from the general public about discount or affiliation advertising. (F 148; CX 27; CX 28).

148. The complaints about discount or affiliation advertising have come only from optometrists or from their professional association, The Massachusetts Society of Optometrists. (Edelstein 312–13; CX 111; CX 115; CX 123A; CX 124; CX 125; CX 130; CX 134; CX 136; CX 140; CX 147; CX 150; CX 153A; CX 155A; CX 157; CX 159–60; CX 163A; CX 174; CX 180; CX 184; CX 187; CX 190; CX 192–93; CX 196–97; CX 201–02; CX 206; CX 208–09; CX 211; CX 213; CX 216A; CX 217A; CX 219A).

4. Free Goods

149. Along with a general ban on deceptive advertising by optometrists, Mass. Gen. Laws Ann. ch. 112, § 73A prohibits advertisements that contain "any statement containing the words 'free examination of eyes'; 'free advice'; 'free consultation'; 'consultation without obligation' or any other words or phrases of similar import which convey the impression that the eyes are examined for free." (CX 18P). Section 73A does not prohibit the advertising of free optometric goods, such as contact lenses. (*Id.*).

150. The Board relied on Section 73A as a basis for banning truthful advertising by an optometrist of free goods with a purchase of eyeglasses. (CX 29 at 7–8, ex. H–1, H–2, I, J). In September 1984, the Board informed Dr. Harvey Leavitt that advertising the availability of free goods with the purchase of eyeglasses violated Mass. Gen Laws Ann. ch. 112, § 73A and instructed Dr. Leavitt to discontinue advertising the free goods. Dr. Leavitt complied with the Board's instructions and discontinued his advertising. At the time of instructing Dr. Lea-

vitt to discontinue advertising free contact lenses, the Board had no information that indicated that Dr. Leavitt was not providing free contact lenses as advertised. In fact, Dr. Leavitt was providing free contact lenses as he had advertised. (*Id.*).

5. Appearance of Fee Splitting

151. Section 73B permits optometrists and opticians to affiliate as long as certain conditions are met. (F 48–50). Dr. William Killilea, an optometrist who leased space from Sterling Optical, maintained an office located next to a Sterling Optical store in the Worchester Center Mall. (Rymeski 238–39). Dr. **[25]** Killilea's office complied with the requirements of § 73B. There was a separate entrance to the mall corridor and there was no sharing of fees. (*Id.* at 239, 242).

152. Sterling Optical advertised the availability of Dr. Killilea's services in an advertisement that offered a contact lens package for $88, including a $40 fee for an eye-examination paid directly to Dr. Killilea. (CX 223B; Rymeski 241–42).

153. On February 1, 1983, the Board informed Dr. Killilea that the Sterling Optical advertisement violated Board Regulation 246 C.M.R. 3.08 and that an optometrist may not "appear to" share or split fees with a non-optometrist. (CX 225). No Board regulations prohibited the "appearance of fee-splitting." (CX 13).

154. In response to the Board's allegations of violations of its rules and regulations, Sterling Optical eliminated all mention of Dr. Killilea in its advertisements. (Rymeski 246–47).

6. Connecting Door

155. Section 73B states that an optometrist may locate an office adjacent to that of an optical establishment if the optometrist's office has "a separate entrance and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." (CX 18R).

156. The Board has interpreted Section 73B to prohibit a connecting door between an optometrist's office and an optical establishment. (CX 40B; CX 99A; Rapoport 537–38; DiGregorio 636). The Massachusetts Attorney General notified the Board in 1981 that it would not represent the Board in disciplinary hearings attempting to enforce its interpretation of Section 73B. (CX 71B).

7. Optical Establishments

157. The Board has no jurisdiction over optical establishments. (CX 5P). However, the Board has notified optical establishments that it is

illegal for them to advertise the availability of an optometrist. (F 134, 138, 142–43).

158. The Board also interpreted its regulations to prohibit an optician who is in the employment of an optometrist to advertise on his own, even though no regulation in effect at the time prohibited such advertising. (CX 70A).

159. The Board informed Dr. Krosschell in February, 1985 that he may not include the Eye World logo in his advertisements [**26**] even though no regulation in effect at the time prohibited the use of such a logo by an optometrist. (CX 29 at 27; CX 13).

E. Justifications

1. Discount Advertising

160. The Board has stated with respect to its prohibition on discount advertising that, "Board regulations which had prohibited such advertising represented an implicit regulatory judgment that such advertising was inherently 'deceptive.' " (CX 7B).

161. There is no evidence that optometrists in Massachusetts have falsely or deceptively advertised the availability of discounts. (F 133, 147). There is no documentary evidence of consumer complaints of deceptive advertising of discounts. (F 147). There is no record of any Board investigation or enforcement action concerning an optometrist who deceptively advertised discounts. (F 133).

162. Board enforcement actions were directed at optometrists who, in fact, provide discounts as advertised. (F 117). These actions were in response to complaints from other optometrists. (F 148).

163. The Board has statutory authority to prohibit false or deceptive advertising by optometrists. (CX 18K).

2. Affiliation Advertising

164. Independent optometrists are subject to pressure to over-prescribe as are optometrists who affiliate with non-optometrists. (CX 242 at 42–44).

165. Advertising has the effect of lowering the cost of optometric goods and services without any detrimental effect on quality. (F 65–66). The Board offered several exhibits concerning commercial practice in the market for optometry as "legislative facts" the Board "could have considered." (TR 892–95; RX 5; RX 14–15). These documents were not offered for the truth of the assertions contained therein. (TR 892–95). They add little support to respondent's position. In addition, the Nathan Report (RX 5) is unreliable due to methodological flaws in the preparation of the report. (CX 334–35).

166. The Board has the authority to discipline optometrists who

provide inadequate levels of eye care quality. Mass. Gen. Laws. Ann. ch. 112, § 71. (CX 18K; F 10, 97). The Board did not allege inadequate care against any of the optometrists against whom [27] it enforced its restrictions prohibiting affiliation advertising. (F 134–46).

167. The Board enforced its ban on truthful affiliation advertising against optometrists who were engaged in relationships with optical establishments that complied with Section 73B. (F 151–54; CX 56, CX 29 at 22–23).

168. The Board received no complaints from consumers about confusing or deceptive affiliation advertising. (F 147). The Board has enforced its ban on joint advertising in response to complaints from optometrists rather than from consumers. (F 148).

169. Every optometrist must display a license in a conspicuous place and provide each patient with a memorandum of sale that sets forth the optometrist's name, address, and license number. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I-J).

170. The Board enforced its ban on affiliation advertising against optometrists who were providing eye examinations as advertised. (F 140, 143).

F. Effects

171. The Board's prohibitions on truthful advertising have restrained competition in the provision of optometric services and optical goods in Massachusetts. (F 172–78).

172. The Board has prevented optometrists from disseminating truthful information concerning the availability of discounts. (F 116–33). The Board's prohibitions on advertising discounts have prevented optometrists from competing on the basis of price by preventing them from informing consumers of the availability of lower prices in the form of discounts. In addition, the Board's prohibitions on discount advertising have prevented optometrists from competing on the basis of service by restricting the ability of optometrists to develop high volume practices that could provide consumers with a greater range of choice in selecting eye care services. (*Id.;* F 68–69).

173. The Board has prevented optometrists from disseminating truthful information concerning affiliations with optical establishments. (F 134–46). The Board's prohibitions on affiliation advertising prevent optometrists from competing on the basis of the convenient service and lower prices that can be realized through affiliations with optical establishments by preventing optometrists from publicizing their affiliations to consumers. (*Id.;* F 74, 77).

174. By prohibiting affiliation advertising, the Board has restricted the ability of optical establishments to compete on the [28] basis of convenient service by preventing optical establishments from adver-

tising the availability of the services of an optometrist and reduced the incentive for optical establishments to affiliate with optometrists in Massachusetts. (F 79, 134–46).

175. By prohibiting affiliation advertising, the Board has restricted the ability of optometrists to enter into lawful affiliations with optical establishments by reducing incentives for optical establishments to enter into the Massachusetts market. (F 79).

176. The Board has deprived consumers of the benefits of price and service competition among optometrists by preventing optometrists from advertising discounts and affiliations with optical establishments and by insulating traditional optometrists from competition in the form of advertising. (F 60–61, 72, 116–46).

177. The Board's prohibitions on truthful advertising are likely to cause higher prices for optometric services and optical goods in Massachusetts. (F 60–65, 71, 77–79).

178. The Board's prohibitions on truthful advertising are likely to cause consumers to pay higher prices for optometric goods and to delay or forgo purchases of needed optometric services or optical goods. (F 65).

G. Relief

1. Affiliation Advertising

179. The Board continues to ban all forms of affiliation advertising without regard to the truth or falsity of the advertising. (F 111).

2. Discount Advertising

180. The Board has not repudiated its judgment that discount advertising is inherently deceptive. (F 160).

181. The Board took action to amend its regulations four months after being notified of the Commission's investigation and a few days before the complaint was issued. (F 104–06). Four months after the complaint was issued, the Board adopted regulations that repealed its previous explicit ban. (F 106, 110). The Board's amended regulations do not eliminate restrictions on truthful advertising of discounts. (F 113). The Board's November 1985 regulations add a requirement that optometrists substantiate usual and customary fees when advertising discounts. (F 114). **[29]**

182. In addition, the Board adopted another regulation that specifically bans advertising that offers gratuitous services in violation of Section 73A. (F 113). The Board has relied on Section 73A to ban advertising of free goods. (F 149–50).

183. Fifteen days before publishing its proposal to amend its regulations on June 27, 1985, the Board told an optometrist that advertising

the availability of discounts was illegal and instructed him to discontinue his advertising. (F 132).

3. Danger of Continuing Effects

184. Although some optometrists have not understood its advertising prohibitions (CX 29, ex. D, ex. P, ex. Z, ex. BB), the Board has provided no guidance as to the meaning of the provisions that were added in the November 1985 regulations. (F 20).

185. The Board has not disseminated its revised regulations to optometrists in Massachusetts. (F 115).

186. From at least 1981 to November 1985, optometrists in Massachusetts learned of the Board's ban on discount advertising. (F 118–25, 127–32).

4. Danger of Recurrence

187. The Board has continued to prohibit truthful advertising after being aware of: the Supreme Court decision in *Bates*, the Massachusetts statute prohibiting it from restricting truthful advertising, and the criticism of the EOCA and the State Auditor. (F 11, 81, 84, 88, 101–03, 108–14, 117, 134–46).

II. Conclusions of Law

188. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

a. The respondent is a "person" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

b. The challenged acts and practices of respondent are in, or affect, commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

189. Respondent has acted as a combination or conspiracy of its members to restrain competition among optometrists in the Commonwealth of Massachusetts by: **[30]**

a. Restricting or prohibiting truthful advertising by optometrists.

b. Prohibiting optometrists from truthfully advertising discounts from their usual prices or fees.

c. Prohibiting optometrists from permitting optical establishments or other persons or entities not licensed to practice optometry to truthfully advertise the optometrists' names or the availability of their services.

d. Prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

190. The combination or conspiracy, and the acts and practices

committed in furtherance thereof, have eliminated, restricted, restrained, foreclosed, and frustrated competition among optometrists, and have caused injury to the public.

191. The combination or conspiracy, and the acts and practices committed in furtherance thereof, constitute unfair methods of competition, and unfair acts or practices in or affecting commerce, and are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

192. The order entered in this proceeding is necessary to remedy the violations of law committed by respondent and to protect the public now and in the future.

III. Analysis

More than $100 million is spent on eyecare annually in Massachusetts. This case involves a branch of that market—almost two thousand optometrists licensed in Massachusetts by the respondent Board, a state agency. (F 55).

Traditionally, an optometrist has worked alone or in a small office, relying on word-of-mouth referrals from former patients and shunning growth through commercial practices such as price competition and advertising. In recent years the crumbling barriers to professional commercialization as well as the booming industry for retailing eyecare products through chain stores and franchised operations, featuring heavy advertising, lower prices and greater service, have pressured optometrists to compete more vigorously. The Board, controlled by its optometrist members, has attempted to slow this change. [31]

To preserve the traditional practice, the Board has passed and enforced a series of rules banning: advertising of price discounts, advertising of a lawful affiliation between the optometrist and a retail optical store, as well as testimonials and sensational or flamboyant advertising. The Board argues that the traditional practice results in higher quality eyecare. While this is disputed, there is little doubt that the Board's policy has meant higher prices for optical goods and services in the Commonwealth of Massachusetts.

This case questions whether the Board's policy is truly the political decision of a disinterested state agency taken in the interest of the public health and safety, considering the fact that it is controlled by practicing optometrists who benefit financially from this trade restraint.

A. Combination or Conspiracy

The complaint here attacks respondent's "combination or conspiracy." These terms are derived from the Sherman Act which prohibits

every "contract, combination . . . or conspiracy in restraint of trade." (15 U.S.C. 1). The gist of these terms is "whether or not there is a collaborative element present." *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Tex. 1972).[5] Complaint counsel must, therefore, establish concerted activity which deprives the market of the "independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984). The concerted activity must be among "two or more separate entities." *Fisher v. City of Berkeley,* 106 S.Ct. 1045, 1049 (1986).

Fisher involved a municipal rent control ordinance. The rent ceilings established by the ordinance were enforced by the Berkeley Rent Stabilization Board. Landlords subject to the ordinance alleged that it violated the Sherman Act, being a combination between the government and the landlords, as well as a horizontal combination among the landlords, in restraint of trade. *Id.* at 1049. The Supreme Court held that a restraint imposed unilaterally by a government agency does not become concerted action within the [**32**] meaning of the Sherman Act because it has a coercive effect upon parties who must obey the law, and that merely because the competing landlords must comply with the ordinance is not enough to establish a conspiracy among them. *Id.* at 1049–50. In the absence of concerted action there was no Section 1 Sherman Act violation.

Complaint counsel—recognizing the holding of *Fisher*—no longer rely on their theory of conspiracy between the Massachusetts Board of Optometry and the optometrists it regulates.[6] Complaint counsel argue, however, that *Fisher* does not answer the remaining question of whether the Board members by themselves can conspire to violate the antitrust laws.

There is nothing in the *Fisher* opinion to show that the Berkeley Rent Stabilization Board was controlled by competing landlords, or that the Rent Board members were alleged to have conspired among themselves.[7] Thus, the question remains whether the respondent members of a state agency can be held to have conspired by themselves in violation of the antitrust laws.[8]

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[5] It has been suggested that the terms are synonymous. *Id.* at 950, n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

[6] Complaint counsel's brief dated March 12, 1986 at p. 4, n. 1.

[7] *Fisher* is also distinguished in that the ordinance alleged to be anticompetitive was enacted by populate initiative, a highly unlikely means of conspiracy.

[8] *Goldfarb* does not control this issue. There, the conspiracy was by the Fairfax County Bar Association, a voluntary association of lawyers. Enforcement was by the State Bar, an administrative agency of the state, 421 U.S. at 776: "The State Bar . . . joined in what is essentially a private anticompetitive activity . . . ." 421 U.S. at 792.

Respondent argues that the Board acts as a unit, citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). That case held a parent corporation incapable of conspiring with its wholly-owned subsidiary. The Court reasoned that "the officers of a single firm are not separate actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." 467 U.S. at 769. The Court stressed that concerted activity "inherently is fraught with anticompetitive risk," because "[it] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," while coordination within a single firm may be necessary for the enterprise to compete effectively. 467 U.S. at 768–69. Thus the issue is whether the optometrists on the Board are "separate actors pursuing separate economic interests" and "independent centers of decisionmaking," capable of conspiring together. [33]

This issue of conspiracy is one of fact.[9] And, while there is a presumption of honesty and integrity in the conduct of public officials,[10] less evidence will be necessary to shift the burden of proceeding where a state regulatory board is controlled by members of a profession and the board regulates commercial practices of that profession, since the board members' pecuniary interest may be stronger than their duty to the public in deciding such issues.[11]

The evidence in this case shows that the Board is composed of four optometrists and one public member. (F 3). Board decisions are made by majority vote. (F 5). The Board's decisions are controlled by its four optometrist members.[12] (F 3–6). The optometrists serving on the Board continue to engage in the private practice of optometry during their tenure on the Board. (F 4). The Board members are not public employees, and receive only reimbursement for necessary expenses and a minimal honorarium. (F 4).

The Board's optometrist members do not advertise or affiliate with opticians or "commercial" retailers. (F 21). They do not offer discounts. (F 40). They believe that advertising, offering discounts, or affiliating with optical establishments are inconsistent with optometry's status as a learned profession. (F 34). The Board's restrictions on truthful advertising benefit the Board's optometrist members by in-

[9] Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior by persons with an independent personal stake. *Copperweld Corp.*, 467 U.S. at 768; *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967).

[10] *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713, 1720 (1985); *Federal Prescription Service v. American Pharmaceutical Ass'n*, 663 F.2d 253, 264 (D.C. Cir. 1981); *American Optometric Ass'n v. FTC*, 626 F.2d 896, 913 (D.C. Cir. 1980).

[11] In *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973), the Court held that a state board composed of optometrists in private practice was constitutionally disqualified from conducting hearings looking toward the revocation of plaintiff's license to practice optometry because the revocation would possibly rebound to the personal benefit of members of the board.

[12] The public member has not participated in any of the Board's activities since December 1982. (F 3).

sulating them from competition. [34] (F 21, 34, 70, 72, 79). They have an individual, personal stake in competitive conditions in the market they regulate.[13]

The optometrist members of the Board are individuals capable of conspiring together. Each optometrist on the Board is principally engaged in the private practice of optometry in the market that the Board regulates. The regulations at issue in this case, which the Board optometrist members have combined to pass and enforce, have adversely affected chain optical establishments, as well as other optometrists, competing with Board members. (F 25, 70, 79, 132). Furthermore, in the absence of those regulations, the Board optometrists would compete with each other by individually deciding whether to advertise.

The members of the Board have not pooled their capital and do not share the risk of loss or opportunity for profit. The Board members have separate economic identities, and thus engage in a combination when they act together on the Board. *Arizona v. Maricopa,* 457 U.S. 332, 356–57 (1982). Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior. *Copperweld,* 467 U.S. at 771–74. The optometrists on the Board do not lose these separate identities by being Board members. The issue is decided by "the identity of the persons who act, rather than the label of their hats." *United States v. Sealy, Inc.,* 388 U.S. 350, 353 (1967).[14]

Respondent has, therefore, engaged in a combination and conspiracy as alleged in the complaint.

B. Unfair Methods of Competition

Respondent has banned advertising of discount prices by optometrists and of optometric services offered by retail optical stores. Since all of the challenged restrictions are the product [35] of a "combination or conspiracy," if they are unreasonably anticompetitive respondent has violated Section 1 of the Sherman Act and thereby Section 5 of the Federal Trade Commission Act.[15]

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[13] Optometrists on the Board are independent centers of decisionmaking because they have an "independent personal stake." *Copperweld,* 467 U.S. at 769–70 n. 15. In *Greenville Publishing Co. v. the Daily Reflector,* 496 F.2d 391, 399–400 (4th Cir. 1974) a corporation was held to have conspired with the president of the corporation because he had "an independent personal stake in achieving the corporation's illegal objective."

[14] In *Sealy,* the Court found that thirty independent licensees used their joint ownership of their licensor corporation to effect a horizontal conspiracy to allocate sales territories and fix prices in violation of Section 1 of the Sherman Act. The fact that the single licensor corporation was the "instrumentality of the licensees' " agreement did not obscure the fact that independent competitors had combined. 388 U.S. at 352–54.

[15] Violations of the Sherman Act are violations of Section 5 of the FTC Act. *FTC v. Cement Institute,* 333 U.S. 683, 690–92 (1948).

1. Restrictions on Advertising

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), held that restraints on advertising of professional services violate the First Amendment. Soon thereafter, in 1978, the Massachusetts Legislature adopted legislation requiring its boards regulating professions to comply with *Bates.* The Legislature declared that any regulations adopted by state agencies limiting "competitive advertising relating to the sale price of consumer goods or services" were "void as against public policy." Mass. Gen. Ann. Laws, ch. 112, § 61. (F 11).

In 1979, the Board's regulations still limited "permissible advertising" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (F 81). Its regulations also prohibited optometrists from permitting the use of their "name or professional ability" by retail sellers of optical goods (§ 3.08), and barred "discrimination" in fees for professional services (§ 3.12). (F 82, 83). The Board construed "discrimination" as being the advertising of discounts or the offering of discounts. (F 83, 118–20).

In 1981, the Massachusetts Executive Office of Consumer Affairs advised the Board that several of its regulations were anticompetitive and contrary to the *Bates* decision. (F 84–87). In May 1981, the General Counsel of EOCA told the Board that its anticompetitive regulations would make the Board vulnerable to an antitrust suit. (F 87). Respondent continued to enforce its advertising prohibitions. (F 119–20).

In 1982, the Massachusetts Department of the State Auditor reviewed the regulations of respondent. The State Auditor concluded that the Board was improperly restraining advertising and competition. (F 92–99).

The Board did revise some of its regulations following this criticism. The revised regulations adopted in October 1984, however, were in some respects more anticompetitive than the prior regulations. (F 100–03). The restraint on discount advertising was expanded to cover goods as well as services. (F 102, 149–50). The Board retained its ban on affiliation advertising. (F 101). The Board added a ban on testimonials and sensational or [**36**] flamboyant advertising. (F 103). The Board's enforcement of the 1984 regulations was vigorous and effective. (F 116–17).

The Board knew of the Federal Trade Commission's investigation in February 1985. (F 104). In May 1985 the Board considered criminal prosecution of optometrists advertising discounts. (F 131). On June 27, 1985, eight years to the day since *Bates* and eleven days prior to the

issuance of the complaint in this case, the Board proposed new regulations, which became effective in November 1985. (F 105–06, 110–14).

These revisions eliminated some bans on truthful advertising, including the ban on discount advertising, but retained others, including the ban on advertising of an affiliation between an optometrist and a retail optical establishment, despite renewed criticism from the EOCA about this provision. (F 107–09, 111–12).

2. Advertising as Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates,* 433 U.S. at 364; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976); *American Medical Ass'n,* 94 FTC 701, 1005 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982). (F 60–66). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." 94 FTC at 1005.

Just as the advertising ban in the *American Medical Ass'n* case was inherently anticompetitive so too are the Board's restraints. The Board has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Ass'n* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case parallels *American Medical Ass'n,* it presents an important additional factor. The advertising restraints at issue in this case have the force of law. Optometrists who violate the Board's commands may lose their professional license, and thereby their livelihood. The Board's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Ass'n* at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on a high volume of patients. (F 68–69). Discounts also attract patients during times of low demand. (F 61, 68). A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing [**37**] optometrists from informing consumers that discounts are available, the Board eliminates a form of price competition. (F 72, 77, 80). *American Medical Ass'n,* 94 FTC at 1005. Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. (F 60–62, 65). Consumers respond to discount advertising, enabling the optometrist

to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. (F 68–70).

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18–R). The Board, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. (F 82, 101, 111, 134–46).

A ban on truthful advertising of an affiliation between an optometrist and a retail optical store makes entry by retail optical chains more difficult. (F 79). Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. (F 74, 76). Large optical establishments achieve economies of scale that enable them to offer lower prices. (F 60). They compete successfully by advertising availability of the optometrist. (F 76). Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. (F 79). Prices are lower in states where affiliation advertising is permitted. (F 78).

The Board's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. (F 103). Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 105 S.Ct. 2265 (1985).

3. *Per Se* Doctrine

The Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma,* 104 S.Ct. 2948, 2962 (1984) explained the *per se* doctrine:

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product [38] of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. . . . [T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition. (Citations omitted.)

The *per se* presumption may be used if a restraint is facially anticompetitive, and it has no redeeming virtue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19–20 (1979).

The likelihood that horizontal price restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular indus-

try. *NCCA,* 104 S.Ct. at 2960, n. 21. Agreements among competitors to limit discounts are illegal *per se. Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 648–50 (1980). While the Supreme Court has been slow to condemn rules adopted by professional associations as presumptively unreasonable,[16] if the rule plainly affects price the *per se* presumption will be used. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar,* 421 F.2d 773, 782 (1975). Restrictions on price advertising are *per se* unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Ass'n,* 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be *per se* unlawful. *United States v. Texas State Board of Public Accountancy,* 464 F.Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir.), *cert. denied,* 444 U.S. 925 (1979).[17]

The Board informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa,* 457 U.S. at 348. Moreover, the State Auditor found that: "Contrary to this stated intent, however, the board has invoked the regulation to restrain optometrists from offering reduced **[39]** fees to certain consumer groups, such as senior citizens and company employees." (CX 261 at 10; F 83).

The Board has prohibited the advertising of discounts on optical goods or services by optometrists. (F 83, 102). The Board has enforced this ban. (F 117–19, 123, 126–27). This conduct is therefore illegal *per se.*

There is not, however, similar precedent holding that banning affiliation advertising, testimonials, and sensational or flamboyant advertising is a *per se* violation of the antitrust laws. Judicial inexperience counsels against extending the reach of *per se* rules. *NCAA,* 104 S.Ct. at 2960, n. 21. This conduct should therefore be judged under the rule of reason.

4. Rule of Reason Doctrine

The test of legality under the rule of reason is whether the restraint imposed merely regulates and perhaps thereby promotes competition or whether it may suppress or even destroy competition. *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). "[T]here is often no bright line separating *per se* from Rule of Reason analysis," *NCAA,* 104 S.Ct. at 2962, n. 26 (1984), and a restraint may be held unlawful under the rule of reason without an elaborate market anal-

[16] *FTC v. Indiana Fed. of Dentists,* 54 L.W. 4531, 4534 (decided June 2, 1986).

[17] The theory of the conspiracy finding of the district court in *Texas State Board of Accountancy* has been overruled by *Fisher,* 106 S.Ct. at 1049–50.

ysis, *American Medical Ass'n,* 94 FTC at 1004–1006. If the restraint causes anticompetitive effects, respondent has a heavy burden to demonstrate the existence of a procompetitive justification. *NCAA,* 104 S.Ct. at 2967. "Absent some countervailing procompetitive virtue —such as, for example, the creation of efficiencies in the operation of a market . . . such an agreement limiting customer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." *FTC v. Indiana Fed. Dentist,* 54 L.W. at 4535. Where there is no plausible procompetitive justification for restrictive conduct the rule of reason can be applied "in the twinkling of an eye." *NCAA,* 104 S.Ct. at 2965 n. 39. A procompetitive justification must be reasonably necessary and narrowly tailored to achieve the procompetitive goal. *American Medical Ass'n,* 94 FTC at 1009–10.

Although the Board's conduct banning the advertising of discounts has been held subject to the *per se* rule, *supra,* in order to promote litigation efficiency it will also be analyzed under the rule of reason. *General Leaseway, Inc. v. Nat'l Truck Leasing Corp.,* 744 F.2d 588, 596 (7th Cir. 1984).

The Board's regulations have restrained Massachusetts optometrists from providing consumers with truthful information about the prices and services they offer. Optometrists were stopped from advertising discount prices. (F 119–20, 122, 125, 127–29). The Board stopped retail optical stores from informing [**40**] the public of their lawful affiliation with an optometrist and of the availability of the optometrist's services. (F 135–39, 141–46). Respondent's restraints have had an actual anticompetitive effect in the marketplace. (F 171).

At trial, respondent did not offer or prove a procompetitive justification for its restraints on discount advertising.[18] The only defense respondent offered related to its ban on affiliation advertising, arguing that it is designed to reduce the risk of harm to the public from unrestrained competition in optometry.

Respondent argues that affiliation may cause optometrists to provide lower quality care,[19] either because a lay person may interfere

[18] Respondent argued in its pretrial brief that its restraints on advertising may prevent increased concentration in the retail optical industry and that this amounts to a procompetitive justification. Increased concentration in a market, however, does not necessarily result in anticompetitive behavior between the remaining competitors. The BE study found prices lower on the average in non-restrictive cities where large chain stores and advertising optometrists enjoyed a large percentage of the market. (CX 318 at 4). The BE study found a greater number of optometrists giving higher quality examinations in non-restrictive cities. (CX 318 at 13). Further, optometrists compete with ophthalmologists and opticians to provide eye care services and goods to the public. Respondent failed to prove that the increase in market share by large chain stores would necessarily result in anticompetitive behavior.

[19] While arguing that the Board's reasons for adopting the ban were irrelevant, respondent offered newspaper and magazine articles and an economic report to show what the Board could have relied on in passing the rule banning affiliation advertising. This rationalization lacked materiality. (F 165). Furthermore, even though comity requires respect for the Board's action, it is likely that the Board had a responsibility to explain the rationale and factual basis for its rule. *Cf., Bowen v. American Hospital Ass'n,* 54 L.W. 4579, 4583–84 (decided June 9, 1986).

with the optometrist's independent professional judgment, or because the "commercial motivation" of the [41] optometrist may lessen professional standards.[20] Respondent can uphold professional standards and prevent shoddy work by optometrists by enforcing its disciplinary regulations. (F 9–10). *Bates,* 433 U.S. at 378. And the view that professions are "above" trade is an anachronism. *Bates,* 433 U.S. at 368–72.

The Board argues that advertising of discounts and affiliation advertising may be inherently deceptive. In this case, there is no proof that the prohibited advertising has deceived the public. Preventing deception cannot justify a total ban on truthful advertising. *Bates,* 433 U.S. at 372–75; *American Medical Ass'n* at 1009–10.

Respondent argues that its affiliation advertising ban prevents consumers from being misled into believing that they are getting a better deal at a large chain store when in fact they might only receive a better price but inferior eye care. This ban is an overbroad[21] suppression of truthful commercial speech. *Bates,* 433 U.S. at 376–77. The Board can stop shoddy work directly without broadly prohibiting advertising competition. (F 10).

Respondent made no attempt to justify its bans on testimonials and sensational or flamboyant advertising. Bans on testimonials or undignified advertising are overbroad. "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." *Zauderer,* 105 S.Ct. at 2280; *In re R.M.J.,* 455 U.S. 191 (1982); *American Medical Ass'n,* 94 FTC at 1023–24.

The Board has market power.[22] The Board's disciplinary powers give it the ability to impose sanctions on any optometrist [42] who fails to obey its rules and regulations. (F 10). The Board can impose its restraints on the market for optometric goods and services throughout Massachusetts. (F 7). Under the rule of reason, respondent's conduct is anticompetitive and therefore unlawful under Section 5.

C. Unfair Acts and Practices

The benefit of truthful advertising to consumers is well recognized, *Virginia Pharmacy Board,* 425 U.S. at 765:

[20] Respondent cites *Friedman v. Rogers,* 440 U.S. 1 (1979). There, the Court upheld the Texas Legislature's ban on the use of trade names because the legislature had found that there was a "considerable history in Texas of deception and abuse worked upon the consuming public through use of trade names." *In re R.M.J.,* 455 U.S. 191, 202 (1982). There is no evidence here, however, of deception of the public through affiliation advertising.

[21] "[T]he States may not place absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. at 203.

[22] Because of the proof of actual detrimental effects and the lack of competitive justification for respondent's practices, there was no need for detailed market analysis in this case. *FTC v. Indiana Fed. of Dentists,* 54 L.W. at 4535.

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Restraints on advertising are unfair under Section 5. *American Medical Ass'n,* 94 FTC at 1010–11.

The Commission has held that acts or practices that injure consumers are unfair where the injury is substantial, and is not offset by consumer or competitive benefits, and where consumers could not reasonably have avoided it. *International Harvester,* 104 FTC 949, 1061 (1984). Respondent's advertising restrictions cause Massachusetts consumers to pay higher prices for optometric goods and services. (F 60–66). These restrictions also force consumers to spend additional time and money in order to obtain information about optometric goods and services. (F 60, 67–68, 75–76, 116–17). An increase in the price and in the cost of obtaining information about those goods is a substantial injury to consumers. (F 55).

Respondent's restrictions on the advertising of truthful, nondeceptive information provide no benefits to consumers that outweigh the consumer injury caused by those restrictions. Respondent has offered no credible evidence of any concrete [43] benefit caused by its advertising restrictions.[23] The Supreme Court has noted that "we view as dubious any justification [for advertising restrictions] that is based on the benefits of public ignorance."[24] *Bates,* 433 U.S. at 375.

The consumer injury caused by respondent's advertising restrictions can not reasonably be avoided. Respondent's advertising restrictions apply to all licensed optometrists practicing in Massachusetts.[25] Respondent's advertising restrictions are unfair acts and practices in violation of Section 5.

D. State Action Defense

Parker v. Brown, 317 U.S. 341, 344–45 (1943) held that the Sherman Act was not intended to apply to certain state action. Respondent argues that because it is a state agency it is entitled to the state

[23] In *Bates,* the Court noted that "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378.

[24] The Supreme Court has called restrictions on advertising "highly paternalistic." The Court noted that the preferred alternative is "to assume that this information is not in itself harmful, that people will perceive their best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board,* 425 U.S. at 770.

[25] Massachusetts law authorizes respondent to discipline optometrists and also provides for criminal penalties for violating respondent's regulations. (F 10).

agency exemption. Not every act by a state agency, however, is an exempt act.

To be exempt, the agency's acts must be clearly authorized and supervised by the sovereign state. *Hoover v. Ronwin,* 466 U.S. 558, 568–69 (1984). A state agency acting without clear direction by a sovereign state authority does not gain the exemption. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 790–91 (1975).

In *Goldfarb,* the Court found the Virginia State Bar to be a "state agency by law" engaged in an unauthorized restraint of trade by promulgating a minimum fee schedule and, in considering whether the Bar had *Parker* immunity, the Court ruled that: "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to [**44**] foster anticompetitive practices for the benefit of its members."[26] 421 U.S. at 791. In subsequent opinions, the Supreme Court has reaffirmed its holding in *Goldfarb* that state agencies are not sovereign entities entitled to automatic state action immunity.[27]

A state agency, simply by reason of its status as such, does not, therefore, qualify as the state acting in its sovereign capacity. Action by a state agency may, however, reflect state policy to displace competition with regulation. Such action will not violate the federal antitrust laws provided an "adequate state mandate for anticompetitive activities" exists. *City of Lafayette,* 435 U.S. at 415. This mandate exists when it is found [**45**] "that the legislature contemplated the kind of action complained of." *Id.*[28]

To determine whether the independent acts of the Board as a non-sovereign state representative should be imputed to the Common-

[26] The Virginia State Bar was a state agency for the purpose of issuing ethical opinions, one of which contained the anticompetitive fee schedule. *See* 421 U.S. at 776, n. 2.

[27] A plurality of the Court stated in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (opinion of Brennan, J.), that "[p]lainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws." In *Southern Motor Carriers Rate Conference, Inc. v. United States,* 105 S. Ct. 1721 (1985), the Court cited with approval the statement in *City of Lafayette* that " '*Goldfarb* . . . made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.' " *Id.* at 1729, *quoting City of Lafayette,* 435 U.S. at 410 (opinion of Brennan, J). In *Southern Motor Carriers,* the Court stated that while the public service commissions of four states permitted collective rate-making by private common carriers, these state agencies, "[a]cting alone . . . could not immunize private anticompetitive conduct." 105 S.Ct. at 1730. Only the state legislatures, as sovereign bodies, could do so. The collective rate-making was found to be immune only because it was "clearly sanctioned by the legislatures." *Id.*

[28] *Hoover v. Ronwin,* 466 U.S. 558 (1984) is an example of a case where Parker immunity applied because the acts complained of were those of the state supreme court directing and controlling a state agency, the bar examination committee. There the Arizona Supreme Court gave the state bar committee discretion in compiling and grading bar exams but retained strict supervisory power and ultimate full authority over its actions; the court rules specified the subjects tested and the qualifications of applicants; the grading system created by the committee had to be approved by the court; the committee authority was limited to recommendations and the court itself made final decisions to grant or deny applications for admissions; and aggrieved applicants were authorized to file petitions for reconsideration directly to the court—the denial of an applicant was the act of the Supreme Court and was immune under *Parker,* 466 U.S. at 572–73. The Court note that: "Our attention has not been drawn to any trade or . . . profession [other than law] in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court." 466 U.S. at 581, n. 34.

wealth of Massachusetts, facts must be analyzed under the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[29]

In order to satisfy the requirements of *Midcal,* respondent must first establish that its restraints on truthful advertising by optometrists were imposed pursuant to a clearly articulated and affirmatively expressed state policy. *Midcal,* 445 U.S. at 105. It is not enough to show that the state's position was one [**46**] of "mere neutrality" concerning truthful advertising. *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 55 (1982).

In the Massachusetts statutes cited by respondent there appears to be no mandate or authorization to perform the acts alleged in the complaint in this case. The Massachusetts legislature has not mandated that the Board prohibit optometrists from truthfully advertising discounts from their usual prices and fees. In fact, the state legislature has specifically directed to the contrary in Mass. Gen. Laws Ann. ch. 112, § 61 (F 11):

> Except as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain trade or lessen competition.[30]

This mandate by the legislature is similar to the facts in *Goldfarb* where the Bar promulgated an ethical opinion containing a minimum fee schedule that violated the ethical code provision adopted by the Virginia Supreme Court, which "explicitly directed lawyers not 'to be controlled' by fee schedules." *Goldfarb v. Virginia State Bar,* 421 U.S. at 789. The Court denied state immunity for the state agency's unauthorized restraint of trade.

The Commonwealth of Massachusetts has not articulated a policy prohibiting truthful advertising but has stated a policy favoring truthful advertising by professions regulated by state boards of registration. Furthermore, since no evidence was adduced on the issue, respondent also has failed to meet the second test of *Midcal,* that its

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[29] A state agency must meet the *Midcal* test to gain *Parker* immunity. *Hoover v. Ronwin,* 466 U.S. at 568–69; *Deak-Perera Hawaii, Inc. v. Dept. of Transportation, State of Hawaii,* 553 F.Supp. 976, 981, 985–89 (D. Hawaii 1983), *aff'd,* 745 F.2d 1281 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1756 (1985); *Gambrel v. Ky. Board of Dentistry,* 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied,* 459 U.S. 1208 (1983); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 275 (9th Cir. 1982); *United States v. Texas State Board of Public Accountancy,* 464 F.Supp. 400 (W.D. Texas 1978), *aff'd per curiam,* 592 F.2d 919 (5th Cir.), *rehearing denied,* 595 F.2d 1221, *cert. denied,* 444 U.S. 925 (1979).

[30] The only restrictions on advertising "otherwise provided" by Massachusetts law are prohibitions on deceptive or misleading advertising and on claims that eyes are examined free. Mass. Gen. Laws Ann. ch. 112, § 73A. (CX 18P-Q).

conduct is actively supervised by [47] the state.[31] Respondent therefore does not qualify for state action immunity.

E. Not a Person Defense

Respondent argues that because it is a state agency it is not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. The case law, however, shows to the contrary.

State and county hospitals are persons within the meaning of the Robinson-Patman Act. *Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 155–56 (1983). As agents of the state, local governments have been held to be persons within the meaning of the Sherman Act and the Clayton Act as amended by the Robinson-Patman Act. *City of Lafayette*, 435 U.S. at 394–97.[32] Terms in Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277–78 (1975).[33]

Furthermore, the Commission has expressed the opinion that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists*, 93 FTC 321, n. 1 (1979) (interlocutory order). And a state board [48] has been held to be such a person. *Rhode Island Board of Accountancy*, FTC Docket No. 9181, Order of February 12, 1985 (M. Brown, A.L.J.).

Respondent is, therefore, a person within the meaning of the Federal Trade Commission Act.

F. Mootness

The Commission complaint, issued in July 1985, cited four kinds of advertising that were banned by the Board. On November 7, 1985, the Board repealed three: the bans on sensational and flamboyant advertising, and testimonials, and the advertisement of discounts. (F 112). The revision added two more, banning advertising that offers gratuitous services,[34] and requiring that optometrists offering discounts

[31] In *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985), the Court held that a municipality may qualify for state action immunity without showing active state supervision because municipalities are an arm of the state and may be presumed to act in the public interest, whereas private parties must show active state supervision because they may be presumed to act primary in their own interest. When the actor is a state agency the Court indicated—but did not decide—that "it is likely" that state supervision would also not be required. *Id.* at 1720, n. 10. Where the state agency is composed of industry members regulating the industry, however, there apparently must be proof of active supervision by the state for the state action doctrine to apply. *See Hoover v. Ronwin*, 466 U.S. at 569, where the degree to which the state supreme court supervised the committee on bar examinations, a state agency, was relevant to the state action analysis.

[32] The Court relied on the presumption against implied exclusions from coverage to the antitrust laws. *Id.* at 398.

[33] A transgression of the Sherman Act or the Clayton Act violates the Federal Trade Commission Act. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 609 (1953).

[34] Section 5.11(1)(b) now prohibits "[a]dvertising which offers gratuitous services, in violation of Mass. Gen. Laws Ann. ch. 112, § 73A." (F 113). The statute provision cited in this regulation only bans offers of free eye examinations in connection with advertisements for eyeglasses and contact lenses. Another regulation, § 5.11(1)(c), bans advertising that violates § 73A. (F 113). Section 5.11(1)(b) therefore may mean that any advertising of gratuitous services is a violation of Section 73A. In the past the Board has used Section 73A to suppress advertisement of free goods

(footnote cont'd)

must substantiate their usual and customary fees. (F 113–14). The fourth regulation cited in the complaint, prohibiting optometrists from allowing a retail optical establishment to advertise their names or the availability of their services, was essentially unchanged. (F 111).

The Board published on June 27, 1985, the proposal to eliminate some of its regulations that ban truthful advertising. (F 105). This action occurred eleven days before the complaint was issued in this case, and months after the Board learned that it might be sued by the FTC. (F 104, 106). By reasonable inference, [**49**] the proposal was caused, at least in part, by the Board's awareness of the Commission's investigation.[35]

The Board enforced its regulations against discount advertising until June 1985, just prior to issuance of the complaint. (F 123–32, 183). The respondent has restrained truthful advertising well after it should have known that its conduct was illegal. (F 187).

The Board has never disavowed its position that advertisements offering discounts are inherently deceptive. (F 180).[36] Optometrists have been confused about what the Board's regulations meant and what sort of advertising would be permitted. (F 184). The Board has no advisory opinions that provide guidance to optometrists. (F 20).

Respondent argues that there is no reasonable expectation that the wrong will be repeated and the case has become moot. This was discussed in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953):

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal [**50**] as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Since a violation has been proved, the burden of showing mootness is on respondent, while complaint counsel have the burden of showing

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or non-examination services. (F. 149–50). The Board adopted a regulation in October 1984 that banned advertising discounts as to both goods and services, whereas its prior regulation had only addressed discounted prices for services. (F 102). Consequently, the new regulation may prohibit the advertising of free services beyond that prohibited by statute, including free follow-up care or eyeglass adjustments.

[35] There is nothing in the record to show that the June 27, 1985 proposal was not based on the Commission's investigation. Respondent's proposed finding No. 64 incorrectly cites Dr. Rapoport's testimony to that effect. He was testifying about why the Board tabled its investigation of one case of discount advertising—not why the Board proposed to change its regulations in June 1985, including the proposed deletion of its rule banning discount advertising. (TR 540–41).

[36] Mootness requires such an announcement. *American Medical Ass'n v. FTC*, 638 F.2d 433, 451 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

that there exists a cognizable chance of recurrent violation necessitating injunctive relief. *SCM Corp. v. FTC*, 565 F.2d 807, 812, 813 (2d Cir. 1977), 612 F.2d 707, *cert. denied*, 449 U.S. 821 (1980). The violation here was egregious. The Board's intent was to prevent optometrists from offering reduced fees to certain consumer groups. The Board continued the unlawful practice for years after it had knowledge that the rules and conduct were illegal and probably unconstitutional. The Board partially discontinued the regulations only after being apprised of the FTC investigation. This evidence shows a "cognizable danger" of repetition by the Board. *TRW, Inc. v. FTC*, 647 F.2d 942, 953–54 (9th Cir. 1981).

IV. Remedy

The type of order that is necessary to cope with the unfair practices found should be clear and precise. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). All roads to the prohibited goal should be closed so that the order may not be by-passed with impunity. *FTC v. National Lead Co.*, 352 U.S. 429, 431 (1957). The order here is designed to prevent a recurrence of the illegal conduct by prohibiting the Board from imposing restraints on truthful advertising, while permitting the Board to carry out its legitimate functions, prohibiting false or deceptive advertising and enforcing statutory restrictions on advertising.[37]

The evidence shows that the Board prohibited the advertising of discounts. (F 83, 102). The Board enforced its prohibition at "informal conferences" at which offending optometrists were warned to cease such conduct, (F 121–22, 124–25, 132). The Board also instructed optometrists and an advertising agency that advertising discounts for optometric services was illegal, unprofessional, or otherwise improper. (F 118–20, 123, 125–30). Paragraph II A prohibits acts by the Board to prevent the advertising of discounts. Paragraph II A also prohibits the [51] Board from restricting the offering of discounts.[38] It does not prevent the Board from prohibiting false advertising of discounts.[39]

The Board is prohibited by paragraph II B from restraints on "affiliation advertising." The Board has adopted regulations prohibiting such advertising (F 82, 101, 111), has enforced the prohibition, and has declared affiliation advertising to be improper or illegal (F 134–46, 151–54, 157).

Paragraph II C involves testimonials in advertising, and advertis-

[37] *American Medical Ass'n*, 94 FTC at 1040, *modified*, 99 FTC 440, *modified*, 100 FTC 572 (1982).

[38] The Board's intent has been to prohibit the offering of discounts. (F 83).

[39] The order does not challenge the Board's application of 246 C.M.R. § 5.11(6), which requires substantiation of "usual and customary fees" when offering discount fees. Substantiation appears appropriate to assure that advertised discounts are not false or deceptive.

ing that the Board believes is sensational or flamboyant. From October 1984 to November 1985, the Board had rules prohibiting such advertising. (F 103).

Paragraph II D of the order prohibits the Board from using any other person or organization to take action prohibited by the order.

Part III of the order provides for petitioning of the legislature for statutory changes affecting matters covered by the order.

Part IV of the order imposes affirmative obligations on the Board. The Commission's authority to issue orders requiring a respondent to make affirmative disclosures, including sending notices to affected parties, is well-established.[40]

Paragraph IV A of the order requires the Board to notify optometrists in Massachusetts of the entry of an order against the Board by mailing a copy of the final order, and an announcement summarizing the order, to all optometrists currently licensed in Massachusetts, to all current applicants for a license in Massachusetts and applicants during a period of five [**52**] years after entry of a final order, and to the Massachusetts Optometric Association.

The Board has been enforcing its prohibitions of truthful advertising in Massachusetts for several years, and has informed optometrists that such advertising is illegal and improper. (F 187). The notice is designed to inform optometrists in Massachusetts of the order. The order allows the Board one year to include the notice and order in its regular mailings for annual license renewal, thus avoiding the cost and burden of a separate mailing. The order gives the Board sixty days to send a single notice to the state optometric association and subsequent applicants.

Complaint counsel proposed an order requiring the Board to repeal 246 C.M.R. § 5.07(3), which prohibits optometrists from permitting or participating in affiliation advertising by non-optometrists. This case was not tried on the theory that the rule is preempted by Section 5 of the FTC Act. *See Fisher,* 106 S.Ct. at 1048. That theory requires a different, higher standard of proof. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659–61 (1982). The rule, therefore, should not be abrogated. *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919 (5th Cir.), *cert. denied,* 444 U.S. 925 (1979).

Paragraphs IV B-C are reporting and recordkeeping provisions to assure compliance with the order.

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[40] *American Medical Ass'n,* 94 FTC at 1039–40; *Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied,* 106 S.Ct. 1167 (1986); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978); *Heater v. FTC,* 503 F.2d 321, 323 n. 7 (9th Cir. 1974).

ORDER

I.

For the purpose of this order, the following definitions shall apply:

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, members, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in [53] Massachusetts, or the imposition of a reprimand, fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses, contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112, §§ 66 *et seq.* is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising the price of any optometric service or optical good.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price for optometric service or optical goods;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any other

advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any optometrist or organization to take any of the actions prohibited by this part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the [**54**] meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to otherwise violate Massachusetts statutes.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;

2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and

3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

B. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

C. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and [**55**] copying, all documents and records containing any reference to any matter covered by this order; [**56**]

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. § 5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically Mass Gen. Laws Ann. ch. 112, § 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes,' 'free advice,' 'free consultation,' 'consultation without obligation,' or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

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Chairman
Massachusetts Board of Registration
in Optometry

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner:*

I. INTRODUCTION

A. Background

Respondent Massachusetts Board of Registration in Optometry is charged with engaging in practices constituting (1) unfair methods of competition and (2) unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by unreasonably restricting truthful advertising.

Respondent is a state agency that regulates the practice of optometry in Massachusetts. IDF 1–13.[1] But the Massachusetts Legislature has vested respondent with only limited authority to regulate advertising. Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that: [2]

> Except as otherwise provided in this chapter, no such board shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers, the effect of which would be to restrain trade or lessen competition.

(Emphasis added). In promulgating this law, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[2]

These statutes apply to the regulations promulgated by the respondent.

Notwithstanding the determination by the Massachusetts Legislature limiting respondent's authority to issue regulations restricting truthful competitive advertising, on two occasions respondent promulgated regulations that are the subject of the [3] challenge in this action. The first set of challenged regulations became effective on July 1, 1979, and included the following restrictions: (a) Section 3.08 of respondent's regulations prohibited any optometrist from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment;"[3] and (b) Section

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[1] The following abbreviations are used in this opinion:

ID – Initial Decision of the Administrative Law Judge
IDF – Numbered Finding of the Administrative Law Judge
CX – Complaint Counsel's Exhibit
RB – Respondent's Post-Trial Brief
RAB – Respondent's Appeal Brief

[2] Mass. Gen. Laws Ann., ch. 112, §61 (emphasis added). IDF 11. The only limitation on truthful advertisements proscribed by chapter 112 is contained in §73A, which provides:

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any . . . advertisement any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes", "free advice", "free consultation", "consultation without obligation", or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

[3] Respondent claims that this regulation was promulgated in accordance with Sections 72 and 73B of Mass. Gen. Laws Ann., Ch. 112. RAB at 46–48. Section 72 requires an optometrist to practice under his or her own name. Section 73B states:

> No person shall practice optometry on premises not separate from premises whereon eyeglasses, lenses, or eyeglass frames are sold by any other person; nor shall any person practice optometry under any lease, contract or other arrangement whereby any person, not duly authorized to practice optometry, shares, directly, or indirectly, in any fees received in connection with said practice of optometry. For the purposes of this section, any room, suite of rooms or area in which optometry is practiced shall be considered separate premises

(footnote cont'd)

3.12 prohibited any optometrist from "discriminating directly or indirectly in his professional services." Respondent interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. CX 29 at 4, 6; CX 261 at 10–11.

Consistent with the state policy precluding prohibition of truthful advertising, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor criticized respondent for issuing the anticompetitive [4] restraints. IDF 84–99.[4] Respondent thereafter revised its regulations and on October 18, 1984, promulgated the second set of regulations challenged by the complaint in this matter. IDF 100–103. In the regulations, respondent retained its restriction on affiliation advertising;[5] replaced Section 3.12 of its regulations with an explicit restriction on discount advertising;[6] and added two other explicit restrictions on advertising. Section 5.11(d) declared "advertising which uses testimonials" to be contrary to the public interest. Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant."[7] In sum, not only did respondent [5] fail to follow the advice of the two state agencies, it acted to impose even more anti-competitive restraints.

After a three-week trial, Administrative Law Judge James P. Timony, in an initial decision filed June 23, 1986, found that respondent has attempted to slow the growth of "commercial" optometric practice through its restraints on truthful advertising, and that the result has been higher prices for eye care in Massachusetts. ID 30–31. He found that respondent's actions were controlled by practicing optometrists who stood to benefit financially from the restraints on competi-

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if it has a separate and direct entrance from a street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building.

[4] To the extent not inconsistent with the Findings in this opinion, the Commission adopts all of the Findings of Facts by Administrative Law Judge James P. Timony in his Initial Decision filed June 23, 1986.

[5] Section 5.07(3) of its 1984 regulation states:

> An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [sic] authorize an optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

IDF 101.

[6] Section 5.11(1)(f) of respondent's 1984 regulations declares advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients to be contrary to the public interest. Section 5.11(1)(f) expanded respondent's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. IDF 102.

[7] The Commission's investigation came to the attention of respondent in February 1985. IDF 104. On June 27, 1985, respondent published a notice of proposed changes in its regulations in the Massachusetts Register. IDF 105. On November 7, 1985, subsequent to the filing of the complaint in this matter, respondent promulgated revised regulations. IDF 106, 110–115. Section 507(3) of the 1985 regulations continued to prohibit affiliation advertising by prohibiting optometrists from permitting or authorizing the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry. In addition, respondent imposed a requirement that "[u]nauthorized advertising or publicizing of a license's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee". The November 1985 amendments also deleted Sections 5.11(1)(a) and 5.11(1)(f). While the absolute bans on sensational, flamboyant, or discount advertisements were deleted, respondent added a new regulation, Section 5.11(6), which required usual and customary fees to be substantiated when optometrists offer discount fees for services or materials.

tion and ruled that respondent's conduct constituted a "combination or conspiracy." ID 31–34. He further ruled that respondent's ban on discount advertising was *per se* unlawful, ID 37–39, and that all of the restraints were unlawful under the rule of reason, finding no valid justification for respondent's suppression of [**6**] broad categories of truthful information about prices and services offered by optometrists. ID 39–42.

Judge Timony rejected respondent's state action defense and held that respondent's actions constituted unfair methods of competition and unfair acts or practices in violation of Section 5. ID 42–47. He also rejected respondent's contention that part of the case was moot, and held that the evidence established a cognizable danger of a recurrent violation warranting prospective relief. ID 48–50.

Judge Timony issued an order that prohibits respondent from restricting the advertising or offering of discounted prices, advertising of affiliations between optometrists and optical retailers, use of testimonials in advertising, and advertising that respondent considers "flamboyant" or "sensational". ID 51–52. The order permits respondent to regulate false or deceptive advertising and to enforce statutory restraints on advertising. The order also requires respondent to notify optometrists in Massachusetts of the cease-and-desist order.

B. Questions Raised By Appeals

This matter is before the Commission on cross-appeals from Judge Timony's initial decision. Respondent raises seven issues for review. First, respondent argues that Judge Timony incorrectly ruled that respondent was not entitled to state action immunity. Second, respondent argues that the Commission [**7**] is precluded from finding that respondent has violated the Federal Trade Commission Act absent a showing that the antitrust laws preempt those actions. Third, respondent assigns error to Judge Timony's ruling that the regulations and enforcement actions of respondent constituted a "combination or conspiracy" proscribed by the FTC Act. Fourth, respondent argues that Judge Timony applied the incorrect legal standard in holding that the regulations constitute unfair methods of competition. Fifth, respondent argues that Judge Timony's holding that the challenged acts or practices are unfair in violation of Section 5 is in error. Sixth, respondent assigns error to Judge Timony's conclusion that the repeal of three of the challenged regulations does not render the claims for relief moot. Finally, respondent claims that Judge Timony's order that respondent notify Massachusetts optometrists of the cease-and-desist order is outside of the scope of the Commission's authority.

Complaint counsel appeal Judge Timony's decision not to require repeal of respondent's regulation banning affiliation advertising. In addition, complaint counsel request that the Commission broaden the order to prohibit restraints on all forms of price advertising and make other modifications and clarifications of Judge Timony's order to ensure effective relief. We now take up these issues although in a different order. [8]

II. LEGAL ANALYSIS

A. Restraint of Trade

1. The Law of Horizontal Restraints

The Supreme Court's recent decisions in *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) [hereinafter "*NCAA*"], and *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) [hereinafter "*BMI*"], are important developments in the law on horizontal restraints and merit attention. In *BMI*, the Court remanded for rule of reason analysis an agreement among a group of composers to issue a blanket license to CBS to perform the composers' songs. The Court concluded that a pricing arrangement that is essential to a legitimate purpose is not within the *per se* rule. In doing so the Court observed that the arrangement at bar was necessary to the production of the compositions and therefore served a legitimate purpose in the marketplace. The Court rejected a simplistic and literalistic test whether competitors "fixed" a "price," but rather inquired whether "this particular practice is . . . 'plainly anticompetitive' and very likely without 'redeeming virtue.' " *BMI*, 441 U.S. at 9. It elaborated on how to identify such practices, instructing courts to ascertain "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead [9] one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Id.* at 19–20.

Five years later, in *NCAA*, the Court refused to apply the *per se* rule to allegations that the NCAA had fixed prices for telecasts of collegiate football games and that the exclusive network contracts were tantamount to a group boycott of all other broadcasters. Although the Court recognized that the exclusive contracts restricted pricing and output, it again declined to invoke the *per se* rule. In order to consider the restraint, the Court considered the defendants' claimed justifications. However, once the Court was convinced that the NCAA's asserted justifications did not withstand scrutiny, it condemned the practice as an unreasonable restraint of trade.[8]

[8] In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Court again applied the *NCAA* analysis. It reversed a Court of Appeals decision vacating a Commission decision that a conspiracy among dentists to refuse

(footnote cont'd)

Several points flow from the Court's pronouncements. First, the Court expressly stated that there is often no bright line that separates *per se* from rule of reason analysis, thus [10] destroying the neat taxonomy that characterized many an antitrust course outline. Second, the Court went on to say that the essential inquiry under both is the same, *i.e.*, "whether or not the challenged restraint enhances competition."[9] Thus the Court has explicitly recognized the breakdown of the tidy rules that at least superficially characterized much of the traditional wisdom. One important—perhaps the most important—result of the cases is that the utility of the conventional labelling exercise has been called into question.[10] Indeed, as one commentator has observed, litigants and courts have taken positions that distort *both* ends of this dichotomy—saying that conduct must be condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category; while conduct falling into the residual rule of reason category cannot be condemned at all until all aspects of definition, market power, intent, and net competitive effect have [11] been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture.[11]

A structure for evaluating horizontal restraints emerges from the Court's recent decisions. Although the Court has not explicitly adopted this structure for analyzing horizontal restraints, the basic principles of the analysis are set forth in the *NCAA* and *BMI* opinions. The

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to submit x rays to dental insurers for use in benefits determinations constituted an unfair method of competition. In so doing, the Court observed that no elaborate analysis was required to see the anticompetitive nature of the dentists' agreement, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. . . ." *Id.* at 459. The Court rejected the dentists' argument that the Commission erred in not making elaborate market power determinations, stating "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." *Id.* at 460. The Court found that the boycott of insurers increased the cost of dental care and rejected the quality of care arguments with equal alacrity.

[9] *NCAA*, 468 U.S. at 104.

[10] A good example of the conventional wisdom antedating *NCAA* is the Seventh Circuit's 1982 decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1093 (7th Cir.), *vacated on other grounds*, 1982–83 Trade Case Cas. (CCH) ¶65,214 (7th Cir. 1983), *on rehearing*, 726 F.2d 1150 (7th Cir. 1984), *rev'd*, 470 U.S. 373 (1985) ("The great watershed of . . . [antitrust] law is the distinction between per se illegality and illegal under the Rule of Reason.").

[11] *See* T. Muris, *The Bureau of Competition's Approach To Applying The Rule of Reason* (unpublished manuscript).

Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), is an excellent example of the former method of analysis. There a professional golfer was alleged to have improved the lie of her ball during a LPGA tournament in violation of the rules of golf. After a complaint, observers were appointed to watch the golfer and they allegedly reported illegal ball movement. The golfer was suspended from play by the LPGA. An antitrust suit for treble damages ensued alleging that the suspension amounted to an illegal group boycott. The plaintiff moved for summary judgment asking the court to characterize defendants' conduct as *per se* in nature and to reject the defendants' explanations of the reasonableness of their suspension of plaintiff. The court agreed: A group boycott of this variety is a *per se* violation of the law. Whether the plaintiff had cheated in professional tournament play, and whether suspension of plaintiff occurred because she had cheated in professional tournament play, were irrelevant and would not be considered by the court. The magic of the label. Hornbook consulted: Group boycotts found to be *per se* illegal. The result automatically follows, like night follows day.

method of analysis we employ here is more useful than the traditional use of the *per se* or rule of reason labels but also is consistent with the recent cases that apply a traditional analysis. Under this analysis, the horizontal restraints in question could be condemned, without further factual development, as inherently suspect restraints for [12] which no justifications seem sufficiently plausible to warrant factual inquiry.[12]

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a [13] *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition. It is noteworthy that the Supreme Court in *NCAA* found a plausible efficiency, considered it, found it wanting, and rendered a decision for the plaintiffs under the rule of reason without employing the full balancing test normally associated with the rule.

We now proceed to apply this structure to the case at bar.

2. Advertising As Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Board of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *American*

[12] We recognize that the Court's opinions have at times continued to apply traditional antitrust analysis. *E.g.*, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). Adoption of our approach would not lead to a different result in cases such as *Catalano* or *Maricopa*, which involved horizontal agreements to fix the terms of credit and horizontal agreements to establish maximum prices for medical services.

Medical Association, 94 FTC 701, 1005 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." *American Medical Association,* 94 [14] FTC at 1005. In the same vein, so too are respondent's restraints. Respondent has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Association* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case in large part parallels *American Medical Association,* it presents an important additional factor. The advertising restraints here have the force of law. Optometrists who violate respondent's commands may lose their professional license, and thereby their livelihood. Respondent's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Association,* 94 FTC at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on attracting a high volume of patients. IDF 68–69. Discounts also attract patients during times of low demand. IDF 61, 68. A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing optometrists from informing consumers that discounts are available, respondent eliminates a form of price competition. IDF 72, 77, 80. *American Medical Association,* 94 FTC at 1005. [15] Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. IDF 60–62, 65. Consumers respond to discount advertising, enabling the optometrist to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. IDF 68–70.

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, §73B. CX 18–R. Respondent, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. IDF 82, 101, 111, 134–46.

A ban on truthful advertising of an affiliation between an optome-

trist and a retail optical store makes entry by retail optical chains more difficult. IDF 79. Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. IDF 74, 76. Large optical establishments achieve economies of scale that enable them to offer lower prices. IDF 60. They compete successfully by advertising availability of the optometrist. IDF 76. Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. IDF 79. [**16**] Prices are lower in states where affiliation advertising is permitted. IDF 78.

Respondent's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. IDF 103. Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 647 (1985).

3. Application of Law

a. *Price Advertising*

If a restraint is inherently suspect, that is, it usually restricts output, and has no redeeming virtue, it is unlawful. *BMI,* 441 U.S. at 19–20. The likelihood that horizontal price restrictions restrain output is generally sufficient to dispense with an inquiry into the special characteristics of a particular industry. *NCAA,* 468 U.S. at 546, n.21. Agreements among competitors to limit discounts have been deemed illegal. *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 648–50 (1980). While the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively [**17**] unreasonable,[13] rules plainly affecting price have been so treated. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 782 (1975). Restrictions on price advertising are unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Association,* 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be unlawful. *United States v. Texas State Board of Public Accountancy,* 464 F. Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir. 1979), *cert. denied,* 444 U.S. 925 (1979).[14] Respondent has prohibited the advertising of discounts on optical goods or services by optome-

[13] *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986).

[14] Respondent informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa,* 457 U.S. at 348. Moreover, the State Auditor found that: "contrary to this stated intent, however, respondent has invoked the regulation to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees." CX 261 at 10; IDF 83.

trists, IDF 83, 102, and has enforced this ban. IDF 117–133. The restraint is inherently suspect and presents no plausible efficiency justification. Accordingly, it must be summarily condemned. [18]

b. *Affiliation advertising, testimonials, and sensational or flamboyant advertising*

Similarly, we conclude that respondent's ban on affiliation advertising is facially anticompetitive because it makes entry by retail optical stores more difficult and raises prices for eye care. The fact that this ban deprives consumers of information concerning service rather then price in no way diminishes the inherently anticompetitive nature of the restraints. As the Supreme Court observed in *Indiana Federation of Dentists,* 476 U.S. at 459 (1986), in assessing an agreement withholding information from consumers:

> [a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.

Having determined that respondent's ban on affiliation advertising is facially anticompetitive, we turn now to the two procompetitive justifications proffered by respondent. First, it contends that such advertisements are inherently deceptive. Second, it argues that its ban protects the public from the results of "undue commercial influence." RAB 74, 75–78, 96–97. Neither justification withstands scrutiny. The truthful advertising of a lawful business relationship is not inherently deceptive. Prohibiting truthful statements about a lawful affiliation relationship cannot be justified on the ground that some advertisers may seek to deceive the public. *American* [19] *Medical Association,* 94 FTC at 1009–10; *Bates,* 433 U.S. at 372–75. Neither justification is legally plausible. We therefore reject respondent's "inherent deception" justification.

Respondent's true motivation for its ban on affiliation advertising is revealed by the "undue influence" justification it argued before Judge Timony. Respondent argued that its ban was necessary because such affiliation advertising is the "glue that holds the affiliation . . . together," RB at 91, and that a ban would "exert a moderating influence on the unbridled growth of aggressively competing commercial optometrists." RB at 124. Respondent is apparently attempting to override the legislative judgment that affiliation relationships should be permitted. Moreover, respondent's concerns about undue influence were rejected as groundless by the State Auditor. IDF 94–98. Respond-

ent's undue influence justification is merely a euphemistic way of stating that competition is inappropriate. We disagree.

We similarly conclude that respondent's prohibitions on advertising that uses testimonials or is sensational or flamboyant are anticompetitive on their face because they prohibit techniques that can make the provision of information about optometristic services more effective. Respondent makes no attempt to justify these restraints. Indeed, total bans on testimonials or "undignified" advertising cannot be justified. *American Medical Association,* 94 FTC at 1023–24. Further, the Supreme Court has clearly held that flat bans on "undignified" **[20]** means of advertising lack any justification. *Zauderer,* 471 U.S. at 647–48. In the sum, there is no legitimate justification for respondent's restraints on truthful advertising. Respondent's arguments are not cognizable as antitrust defenses because they are premised on the notion that competition itself is inappropriate in optometry. Accordingly, we conclude that respondent's plainly anticompetitive conduct is unlawful.[15] **[21]**

B. The Commission's Jurisdiction

Respondent argued below that it was not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. This argument was rejected by Judge Timony, ID at 47, and not pressed by respondents on their appeal to the Commission. Nonetheless, we address it here.

"Person" is not specifically defined within the Commission's organic statute.[16] While defined in both the Sherman and Clayton Acts,[17]

[15] On December 15, 1986, after the close of the record and oral argument in this matter, respondent filed a motion to supplement the record in this proceeding to include the Staff Report and Presiding Officer's Report from the Commission's Eyeglasses II rulemaking proceeding. Complaint counsel, on December 22, 1986, filed a timely reply opposing respondent's motion. Respondent argues that the reports' discussion of the optometry industry, including a survey of the 50 state laws that regulate optometric practice, is relevant to its defense that the regulations and enforcement actions which are the subject of the complaint are reasonable exercises to its police power. Further, according to respondent, both proffered exhibits contain extensive analysis of the "quality of care" justifications, which go to its state action defense. Respondent also claims that the analyses of methodology and validity of the "BE Study" in both proposed exhibits are relevant to the validity and usefulness of the BE Study to this proceeding. Having carefully considered respondent's motion, the Commission concludes that the proffered exhibits constitute inadmissable hearsay. The exception in Federal Rule 803(8)(C) for "factual findings resulting from an investigation made pursuant to an authority granted by law . . . unless the sources of information or other circumstances indicate acts of trustworthiness" does not apply to the reports. Both reports are preliminary in nature and do not represent the official views of the Commission. Thus, neither report constitutes "factual findings" of the agency within the meaning of Federal Rule 803(8)(C). *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. In re Japanese Products*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Moreover, to the extent that any evidence in the Eyeglasses II rulemaking record is relevant to this proceeding, respondent had ample opportunity to seek to offer, and in fact did offer, such evidence while this case was still in trial. Accordingly, the motion is denied.

[16] The principal reference to the word "person" is contained in Section 5(a)(2) of the FTC Act, which provides that the "Commission is . . . empowered to prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices. . . ." 15 U.S.C. §45(a)(2)(1982). Obviously, the state Board is neither a partnership nor corporation. Thus, if the Board is subject to the Commission's jurisdiction, it must be as a person.

state boards are not specifically included in the definitions. Nonetheless, local governments, as agents of the state, have been held to be persons within the meaning of the Sherman Act and the Clayton Act. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394–97 (1978). There the Court relied on the presumption against implied exclusions from [**22**] coverage to the antitrust laws. *Id.* at 398. State and county entities are persons within the meaning of the Robinson-Patman Act, 15 U.S.C. §2(a) (1982). *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 155–56 (1983). Terms in the Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277–78 (1975). Accordingly, we hold that respondent is a "person" for purposes of jurisdiction under the Federal Trade Commission Act.

This is consistent with Commission case law. The Commission has held that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists*, 93 F.T.C. 321, n.1 (1979) (interlocutory order);[18] Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). And a state board has been held to be such a person. *Rhode Island Board of Accountancy*, FTC Docket No. 9181, order of February 12, 1985 (M. Brown, A.L.J.).

Our holding is also supported by the legislative history of the FTC Act, which indicates that Congress intended an expansive meaning for the word "person." Section 5 of the FTC Act gives [**23**] the Commission jurisdiction over "every kind of person, natural or artificial, who may be engaged in interstate commerce."[19]

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[17] The term is defined in both the Sherman and Clayton Acts, 15 U.S.C. §§7, 12 (1982). Both statutes provide:

> "[t]hat the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

[18] Although in that case the Commission held that a state is a "person" for purposes of intervenor status, it would be unusual for Congress to assign the term "person" two different meanings within the same section of the same statute. *See United Stats v. Cooper Corp.*, 312 U.S. 600, 606 (1941) ("It is hardly credible that Congress used the term 'persons' in different senses in the same sentence.").

[19] 51 Cong. Rec. 14,928 (1914). Rep. Covington, the House sponsor of the FTC Act and a manager of the Act in Conference Committee, made the following statement on the House floor regarding the jurisdictional scope of Section 5.

> The section which deals with unfair methods of competition confers upon the Commission certain administrative powers somewhat analogous to the Interstate Commerce Commission, extending to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce.

Id. at 14,928.

Rep. Covington's analogy to the Interstate Commerce Commission underscores the Commission's holding. The Elkins Act, 49 U.S.C. §41(1), which was the ICC's version of the Robinson-Patman Act prior to its repeal in 1978, applied to "person, persons, or corporations." In *Union Pacific R. Co. v. United States*, 313 U.S. 450, 463 (1941), the Supreme Court held that a state entity was a "person" within the meaning of the Elkins Act.

Recent amendments to the FTC Act have broadened the Commission's jurisdiction to include acts or practices "in or affecting commerce."

C. The Contract Combination & Conspiracy Requirement

Respondent urges that complaint counsel has not satisifed the duality requirement of Section 1 of the Sherman Act, 15 U.S.C. 1 (1982). RAB at 16. This Section requires that multiple actors agree to a common design. As the Supreme Court has recently observed: "Independent action is not proscribed." [24] *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984). Or, as Judge Sprecher has recently observed:

> The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design.

Contractor Utility Sales Co. v. Certain-Teed Products Corp., 638 F.2d 1061, 1074 (7th Cir. 1981), *cert. denied*, 470 U.S. 1029 (1985). Respondent urges that respondent is a single entity incapable of conspiring with itself.[20]

We disagree. The Supreme Court and lower courts have recently focused on whether there are separate economic entities in play in determining whether a contract, combination or conspiracy is present. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court found that a parent corporation was incapable of conspiring with its wholly-owned subsidiary, stressing that economic reality and not formalism control in assessing whether "separate economic entities" engaged in a common course of action. 467 U.S. at 769–76. Applying the *Copperweld* analysis, Judge Timony correctly found that respondent members have separate economic identities and thus engage in a [25] combination when they act together on the Board. ID at 34. He noted that each optometrist on the Board is principally engaged in the private practice of optometry in the market that respondent regulates. ID at 34. Absent respondent members' agreement that imposed the regulations at issue, the members and all other optometrists in the Commonwealth would be free to compete with each other by individually deciding whether to advertise. ID at 34. It is precisely such combinations to suppress competition that are prohibited by Section 1 of the Sherman Act.

Judge Bork recently reached a similar conclusion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987). There the court found that the

[20] Judge Timony intimates that the terms "contract, combination . . . or conspiracy" probably have slightly different meanings." ID at 31, n.5. *citing FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). Oppenheim, *Federal Antitrust Laws*, 178 n.1 (3d ed. 1968). We read the terms to be synonymous.

directors of Atlas, a nationwide moving company, had conspired among themselves by voting to adopt a policy terminating its contracts with any affiliated carrier in the Atlas network that handled interstate moving business on its own account as well as for Atlas. What took this case "out of the *Copperweld* rule" was the fact that "all but two members of the board represented separate legal entities that competed in interstate commerce." *Id.* at 215. Likewise, the full-time optometrists on the Board are separate legal entities that compete in interstate commerce, and thus are capable of conspiring in restraint of trade. *See also Greenville Publishing Co. v. Daily Reflector,* 496 F.2d 391, 399–400 (4th Cir. 1974) (corporation found capable of conspiring with president of [**26**] corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective.").[21] We apply this reasoning to the case at bar and find that members of the Board are capable of conspiring in violation of the Sherman Act.[22]

Our conclusion that the members of the Board are capable of conspiring is supported by the case law. The Supreme Court, in *Hoover v. Ronwin,* 466 U.S. 558, 575 (1984), acknowledged that the members of the Arizona committee of bar examiners—a state agency composed of practicing lawyers—could conspire with each other. In holding that their actions were immune under the state action doctrine because the challenged conduct was actually that of Arizona Supreme Court, the Court stated that "*[c]onspire as they might,*" the committee members could not affect what was [**27**] ultimately within the control of the Arizona Supreme Court. *Id.* at 575 (emphasis added). Thus the Supreme Court has recognized that state board members are capable of conspiring with each other.

Finally, just as the discussions, voting and agreement in *Rothery* were sufficient to find that the conspiracy requirement was satisfied in that case, we find that the discussion, votes and promulgation of the challenged regulations in the case at bar are sufficient to satisfy the requirement here. *Rothery,* 792 F.2d at 1078–79.

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[21] Professor Philip Areeda has written that the actions of a state agency composed of members of the regulated industry are properly treated by the courts as concerted action. *See* P. Areeda, *Antitrust Law* §203.3c at 17 (Supp. 1982).

[22] Respondent argues that its regulations banning affiliation advertising flow from the broad grant of legislative authority expressed in Sections 72, 73A and 73B of Chapter 112, Mass Gen. Laws Ann. RAB 47. We disagree with this argument. The statutes cited by respondent simply establish the conditions under which optometrists may affiliate with non-optometrists. Judge Timony correctly found that opticians and optometrists, for example, may work together or in affiliation, if the optometrist practices in "separate premises" from the optician. Mass. Gen. Laws Ann. Ch. 112, §73B. IDF 48–49; CX 18R. Contrary to respondent's argument, Sections 72 and 73B, which describe the circumstances under which affiliations may occur, and Section 61, which permits truthful advertising, do not support a finding that the Legislature intended or even contemplated that respondent would promulgate the challenged regulations. We therefore conclude that respondent's argument is erroneous.

D. State Action Immunity

The state action immunity doctrine is the vehicle created by the Supreme Court to resolve conflict between the national policy of competition embodied in the federal antitrust laws and state regulation in our federal system. State action immunity shields the activity challenged here if: (a) the party is acting as the sovereign state; or (b) the state elects to insulate the conduct by adhering to certain narrowly prescribed procedures.

1. Conduct by the State as Sovereign

If a State, acting as sovereign, restrains competition, its actions are *ipso facto* immune from federal antitrust laws. *Hoover v. Ronwin,* 466 U.S. at 567–68. Respondent argues that as a [**28**] matter of state law, it exercises sovereign, statewide authority over the practice of optometry and that it is therefore immune from prosecution. RAB at 27.

We disagree. The Supreme Court has accorded only legislatures and courts status as sovereign. *Hoover v. Ronwin,* 466 U.S. at 568; *Bates,* 433 U.S. at 363. The Court has not accorded other state subdivisions status as the sovereign.[23] For example, although municipalities are state subdivisions, the Court has not accorded them status as the sovereign entity. *Community Communications Co. v. Boulder,* 455 U.S. 40, 44–50 (1981); *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. at 411.

Further, federal appellate and district court rulings involving state regulatory boards have not held that such boards are, merely by virtue of their governmental status, "the state acting as sovereign" for purposes of immunity under *Parker v. Brown,* 317 U.S. 341 (1943). In *Federal Trade Commission v. Monahan,* 832 F.2d 688, 689 (1st Cir. 1987), *cert. denied,* 108 S. Ct. 1289 (1988), the First Circuit declared that the Massachusetts Board of Registration in Pharmacy is not the sovereign, but "a subordinate governmental unit."[24] In this and other cases, the [**29**] courts have looked to state policy as articulated in enactments of the legislature. *See, e.g., First American Title Co. of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439, 1451 (8th Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 275 (9th Cir. 1982); *Gambrel v. Kentucky Board of Dentistry,* 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied,* 459 U.S. 1208 (1983); *Brazil v. Arkansas Board of Dental Examiners,* 593 F. Supp. 1354, 1361–68 (D. Ark. 1984),

[23] *See New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

[24] The Massachusetts Board of Registration in Pharmacy and the Board of Registration in Optometry are two of several boards in the Massachusetts Division of Registration. Mass. Gen. Laws Ann. ch. 13, §§8, 9, 16–18, 22–25. Some of the basic powers and procedures of these two boards are set out in statutory provisions governing all of the boards in that Division. Mass. Gen. Laws Ann. ch. 112, §§61–65.

aff'd per curiam, 759 F.2d 674 (8th Cir. 1985); *United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W.D. Tex. 1978), *modified per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979). Employing the same method of analysis as used in these cases, we hold that the respondent is not entitled to immunity as the sovereign.[25] [30]

2. Conduct That Is Immunized by the State

Second, under the state action doctrine, a state may insulate a regulatory regime from federal antitrust scrutiny where two criteria are satisfied. *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and, second, the policy must be "actively supervised" by the state itself. *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 410). However, in *Town of Hallie v. City of Eau Claire*, [31] 471 U.S. 34, 47 (1985), the Court held that the second prong of the *Midcal* test, *i.e.*, active supervision, need not be satisfied in the context of local government regulation where the defendant is an organ of local government. *See generally* ABA Antitrust Section, *Antitrust Law Developments* 606–11 (2d ed. 1984). We need not reach that question here as complaint counsel and respondent agree that the Commonwealth need not demonstrate active supervision to establish state action immunity in this case.

We now address the first, and determinative prong of the test. Is

[25] Respondent relies primarily upon three cases in support of its argument. First, in *Limeco, Inc. v. Division of Lime of the Miss. Dep't. of Agric. and Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985), the Fifth Circuit held, without discussion, that the Lime Division was an enterprise undertaken by the State to operate lime plants as a commercial enterprise, and, therefore, enjoyed sovereign immunity. Second, respondent cites *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F. Supp. 976 (D. Hawaii), *aff'd*, 745 F.2d 1281, (9th Cir. 1981), *cert. denied*, 470 U.S. 1053 (1985), where a state agency's grant of an exclusive currency exchange concession at an airport was found to be the action of the State of Hawaii acting as sovereign and entitled to state action immunity. (Following their earlier decision in *Deak-Perera*, the Ninth Circuit recently reached the same conclusion in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875 (9th Cir. 1987), which involved a "factual setting nearly identical" with that in *Deak-Perera:* a grant of exclusive taxi privileges at the same airport as in *Deak-Perera.*) Third, in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) the Third Circuit held that an advisory committee to the New Jersey Supreme Court was immune because it acted as the sovereign. Respondent argues that these cases recognize the virtual *per se* antitrust immunity afforded to state agencies.

None of the cases relied upon by the Board is dispositive. *Limeco* involved an executive department in that state, the Division of Lime. Rather than holding that the Division was the sovereign, the Fifth Circuit held that it was an enterprise undertaken by the state, which operated in accordance with the directives of the Mississippi Legislature. *Deak-Perera* and *Charley's Taxi* also do not appear to be dispositive. Although the *Deak-Perera* court held that a state executive agency, when operating within its constitutional or statutory authority, should be deemed to be the State acting in its sovereign capacity, the complaint and the evidence introduced here concern a defendant that has acted outside the statutory authority delegated by the State. At least two district courts have rejected arguments, based on *Deak-Perera*, that state regulatory agencies are automatically entitled to state action immunity because they act as the sovereign. *Bigelsen v. Arizona Bd. of Medical Examiners*, 1985–1 Trade Cas. (CCH) ¶66,488 (D. Ariz. 1985) (immunity does not apply to acts outside agency's statutory authority); *Flav-O-Rich, Inc. v. North Carolina Milk Commission*, 593 F. Supp. 13, 16 (E.D.N.C. 1983) (agency entitled to immunity only when it acts pursuant to clearly articulated state policy to displace competition), *aff'd*, 734 F.2d 11 (4th Cir.), *cert. denied*, 469 U.S. 853 (1984). Finally, the Board's reliance on *Princeton Community Phone Book* is unpersuasive. That case is pre-*Hoover* and contrary to *Hoover's* result.

there a clear articulation of a state policy to displace competition by regulation in the case at bar? Massachusetts law provides the answer to this question. Section 61 of Mass. Gen. Laws Ann., ch. 112 states:

[e]xcept as otherwise provided in this chapter, *no such board shall make any rule or regulation prohibiting the advertising* or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers *the effect of which would restrain or lessen competition.* (emphasis added).

In promulgating this law, the Massachusetts Legislature declared that:

any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[26]

Rather obviously, the Commonwealth articulated a policy *favoring*—**[32]** *not displacing*—competition.[27] (It is probably not mere coincidence that this legislation was enacted shortly after the Supreme Court's decision in *Bates*).[28] Finding no clear articulation to displace competition by state regulation,[29] we **[33]** find that the state action immunity doctrine is inapplicable to the instant case.[30]

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[26] Mass. Gen. Laws Ann., ch. 112, §61. IDF 11 (emphasis added).

[27] Judge Timony has noted that two organs of the Commonwealth's government, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor have specifically criticized the anticompetitive nature of these regulations. IDF 88–99, 107–09.

[28] In *Bates*, the Supreme Court held that governmentally imposed bans on advertising of professional services violated the First Amendment. 433 U.S. at 350.

[29] The Commission is not persuaded that the three cases cited by respondent in its motion of May 1, 1987, support its claim of state action immunity. In *Interface Group, Inc. v. Massachusetts Port Authority,* 816 F.2d 9 (1st Cir. March 30, 1987), the Court held that the Massport was entitled to state action immunity on two grounds. First, the court stated that the Supreme Judicial Court in Massachusetts had explicitly recognized that Massport resembles a municipal corporation and also possesses the powers of eminent domain and bonding authority. In this case, however, there has been no such judicial recognition nor does respondent possess such powers. Second, Circuit Judge Breyer, speaking for the court, held that Massport was acting pursuant to a clearly articulated and affirmatively expressed state policy. The Commission has found otherwise here. Moreover, in his opinion for the court in *Federal Trade Commission v. Monahan,* Judge Breyer distinguished *Massport.* In *Monahan,* the Commission sought to enforce investigative subpoenas directed to the Massachusetts Board of Registration in Pharmacy. Judge Breyer held that the Pharmacy Board, unlike Massport, was not clearly inside "the area of immunity delineated by clear state policy." *Monahan,* 832 F.2d at 690. He concluded that the immunity status of the Pharmacy Board could only be determined after the completion of the FTC investigation.

In *United States v. State Board of Certified Public Accountants,* No. 83–1947, Trade Reg. Rep. (CCH) ¶67,516 (E.D. La. March 11, 1987), the court found that the state statute regulating advertising by professionals specifically authorized the Board to issue the challenged regulations. Further, the challenged rules were reviewed and approved by the state legislature in accordance with state law, thus making the Board's actions the actions of the legislature. The record in the case at bar does not present similar facts.

Finally, as discussed above, the Ninth Circuit's decision in *Charley's Taxi* rests on that court's earlier decision *Deak-Perera.* As we have indicated, the Commission does not believe that these cases are dispositive.

[30] Respondent urges that complaint counsel has failed to establish that the state regulation in issue has been preempted by the federal antitrust laws. Respondent has confused the relationships between the law of federal preemption and state action immunity. We have addressed the requirements of a state action immunity and found respondent's argument wanting. It is *not* state action. Accordingly, the conduct at bar is *private.* The laws on preemption would be relevant only if there were some conflict between state—not private—action and a federal statute.

E. Unfair Acts or Practices

Complaint counsel allege, and Judge Timony has found, that respondent has committed unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982). In considering whether conduct is unlawful as an unfair act or practice, the test is whether the consumer injury is: (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided. *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd, Orkin Exterminating Co. v. Federal Trade Commission*, 1988–1 Trade Cas. [34] (CCH) §67,969 (11th Cir. April 19, 1988); *International Harvester Co.*, 104 FTC 949, 1061 (1984); *Amrep Corp.*, 102 FTC 1362, 1669 (1983); *Horizon Corp.*, 97 FTC 464, 849 (1981).[31]

Having found respondent to have violated the federal antitrust laws, we need not reach the question of whether respondent has committed an unfair act or practice.

F. Mootness

Respondent argues that the repeal of three of the challenged regulations in November 1985 has mooted all claims and foreclosed all relief based on these regulations. RAB at 49. The legal principles for determining when an issue is moot, and thereby requiring dismissal, indicate that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, the defendant would be "free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Supreme Court held in *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952): [35]

> [W]hen defendants are shown to have . . . entered into a conspiracy violative of the antitrust laws, courts will not assume that it had been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.

Thus, when the respondent has voluntarily ceased the challenged activity, a case is not moot unless there is a showing "that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Conyers v. Reagan*, 765 F.2d 1124,

[31] *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972); *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement"), reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment 1969–1983 ¶50,421 at 55,948.

1128 n.9 (D.C. Cir. 1985); *see also County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). The relevant factors to be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations." *W.T. Grant Co.,* 345 U.S. at 633. The burden of these demonstrations is a heavy one, and falls on the respondent. *In Re Center for Auto Safety,* 793 F.2d 1346, 1352 (D.C. Cir. 1980). In our view, the respondent has not met its burden in this case.

The only assurance we have that the respondent has permanently ceased its anticompetitive practices is its argument that repeal of the regulations is tantamount to abandonment. However, the Commission notes that the respondent made a similar claim in an August 1983 letter to the Massachusetts State Auditor, responding to criticism from the State Auditor that Board regulation 3.12 injured consumers because it prevented **[36]** optometrists from offering discounts. IDF 93. Contrary to its protests regarding "time spent on matters which have become obsolete," respondent subsequently issued revised regulations that explicitly banned advertising discounts. IDF 102. Respondent's prior claim to have eliminated a challenged regulation, only to readopt it in another form, leads the Commission to conclude that respondent has not met its burden to prove the "bona fides" of its expressed intent to comply.

Second, although respondent has repealed the three challenged regulations, and claims that it will not reenact or enforce the repealed regulations, the Commission concludes that the respondent has not met its burden to prove effective discontinuance of the illegal activity. The issue is not whether the respondent will reenact the repealed regulations. The focus is more properly on whether the respondent will engage in repeated violations of the same law, namely, imposing anticompetitive restraints on truthful advertising, and not merely with repetition of the same offensive conduct. *TRW, Inc. v. FTC,* 647 F.2d 942, 953 (1981). In our view, respondent's failure to disavow its position that the challenged advertisements are inherently deceptive demonstrates that respondent sees no legal constraint to engaging in similar conduct in the future.

Finally, respondent's continuation of unlawful conduct for years after it had knowledge that the rules and practices were illegal and probably unconstitutional speaks to the serious **[37]** nature of the violative activity. The ALJ found that respondent's conduct was "egregious." ID 50. This characterization was based upon respondent's persistent refusal over a period of years to modify its regulation despite "knowledge that [they] were illegal and probably unconstitutional." ID 50.

Nine years ago, in 1977, respondent became aware of the *Bates*

decision regarding the legality of restraints on advertising by professionals banning truthful advertising, including one prohibiting the advertising of discounts. IDF 83. In 1981, the Massachusetts Executive Office of Consumer Affairs notified respondent that its advertising restraints, including its prohibition of discount advertising, were unduly restrictive in light of *Bates*. IDF 84. Nevertheless, respondent continued to enforce its prohibition of discount advertising. IDF 117–33. In 1983, in a written report, the Massachusetts State Auditor criticized respondent's rule because it prevents "optometrists from offering reduced fees to certain consumer groups, such as senior citizens. . . ." IDF 98. Yet in 1984, respondent adopted Section 5.11(1)(f) which explicitly banned discount advertising. IDF 102. Respondent vigorously enforced this regulation, IDF 126–133, until just prior to the issuance of the complaint in this matter. ID 49, IDF 132.

In light of the record in this case, we agree with Judge Timony that there is "some cognizable danger of recurrent [38] violation." ID 50. Therefore, we conclude that the complaint cannot be dismissed on grounds of mootness.

III. THE ORDER

We conclude that an order prohibiting respondent from continuing to engage in the same or similar unlawful activities in the future is in the public interest. After considering the record in this case and the arguments of counsel for both parties, we have decided to issue an order that differs in some respects from Judge Timony's order. Our discussion of each section of the final order includes on explanation of the changes that have been made.

A. *Part I of the Order*

Part I of Judge Timony's order contains definitions of terms used in the order. Part I.F. defines price advertising as advertising the price of any optometric service or optical good. As complaint counsel argue, the definition in Judge Timony's order does not make clear that the order would cover ads that provide price information, including credit terms or statements such as "reasonable prices," in addition to ads that make specific price claims. We agree and have modified Part I.F. accordingly. [39]

B. *Part II of the Order*

Part II.A of Judge Timony's order prohibits acts by respondent to prevent the advertising of discounts. It also prevents respondent from restricting the offering of discounts. Complaint counsel argue that the evidence in this case establishes a risk that respondent will seek to interfere with other forms of price advertising and that, therefore,

fencing-in relief is needed for price advertising. As we noted in *AMA*, "it is especially important that price advertising remain as unfettered as possible." 94 FTC 1030. In this case, the evidence introduced reveals that respondent has exhibited hostility to various forms of price advertising, not merely discounted prices. For example, its October 1984 rules prohibited "[a]dvertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients. . . ." 246 C.M.R. §5.11(f). We agree with complaint counsel's conclusion that the evidence suggests a basic opposition to competition among optometrists based on price, and a likelihood that respondent might seek to prohibit or restrict other forms of price advertising besides the offering of discounts, absent a broader remedial provision. Part II.A has therefore been modified to include this fencing-in relief.

Part II.B of the order has not been changed. Parts II.C and II.D of the order have been revised to clarify the scope of the [**40**] provisions. Finally, the proviso at the end of Part II, which permits the regulation of false and deceptive advertising, has been clarified to limit the proviso to actions based on a reasonable belief that statutory restraints on advertising are violated.[32] Under Judge Timony's order the proviso may have been interpreted to allow respondent to argue that it may ban advertising on the basis of statutes aimed not at advertising but at other conduct.

C. *Part III*

Part III of Judge Timony's order has not been changed.

D. *Part IV*

A new Part IV.A has been added to require respondent to repeal its current regulation banning affiliation advertising. 246 C.M.R. §5.07(3). This order was originally proposed by complaint counsel before Judge Timony, who rejected it because the complaint had not charged that the regulation was preempted by the FTC. We agree with Judge Timony's observation that this is not a preemption case. *See* Footnote 30 *supra*. However, having found that respondent has unlawfully conspired to prohibit [**41**] the advertising of affiliations between optometrists and optical retailers, the Commission has the authority to issue an order eliminating that unlawful activity. The Commission has the authority to fashion appropriate relief, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). We conclude that repeal of the affiliation advertising ban is reasona-

[32] By "reasonable belief," we mean a belief that is based on the relevant facts and legal precedents. *See Rhode Island Board of Accountancy*, Dkt. No. 9181 (consent order issued February 25, 1986).

bly related to respondent's violation, and necessary to obtain comprehensive relief. If the Commission were to issue an order that did not include repeal, leaving the regulation on the books would have a chilling effect on those who, for whatever reason, are unaware that respondent is barred from enforcing it. The Commission, therefore, has added Part IV.A, which requires respondent to repeal Rule 5.07(3).

Part IV.B requires respondent to notify Massachusetts optometrists of the issuance of the cease-and-desist order in this case. Respondent argues that the Commission is without authority to issue "notification" orders. RAB 119. Relying on cases interpreting the powers of the Consumer Product Safety Commission, respondent contends that the Commission is authorized only to issue cease and desist orders. *See Barrett Carpet Mills Inc. v. Consumer Product Safety Commission,* 635 F.2d 299 (4th Cir. 1980); *Congoleum Industries Inc. v. Consumer Product Safety Commission,* 602 F.2d 220 (9th Cir. 1979).

We disagree. The Commission's authority to issue remedial orders requiring respondents to make affirmative disclosures, [**42**] including sending notices to affected parties, is well-established. *See e.g., Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied,* 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). *See also American Medical Association,* 94 FTC 701, 1039–40 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 452 U.S. 960 (1982). Respondent's reliance on cases holding that the Consumer Product Safety Commission lacked authority to order a program of notification, recall, and repurchase is misplaced, because neither case addressed the issue of affirmative disclosures independent of a restitution program, of which notice was an integral part.[33] We therefore, have not changed Part IV.B of the order.

Parts IV.C and IV.D of the order contain reporting and recordkeeping requirements. Respondent claims that those provisions are onerous and should be modified or eliminated. RAB at 120. Respondent has made no attempt to show undue burden or in what respects the provisions should be modified. The [**43**] requirements are all limited in time and scope and are reasonably related to respondent's violation. They remain unchanged.

[33] Both of the cases cited by respondent were premised on the decision in *Heater v. FTC,* 503 F.2d 321 (9th Cir. 1974), which held that Section 5(b) of the Federal Trade Commission Act does not empower the Commission to order a respondent to pay restitution to injured consumers. The court in *Heater* viewed restitution as a "private" remedy outside the Commission's authority. In *Heater,* the Ninth Circuit Court of Appeals specifically recognized the Commission's authority to order affirmative relief, 503 F.2d at 323 n.7 and 324 n.13, and recently, in *Southwest Sunsites,* 785 F.2d at 1439, that court reaffirmed that affirmative disclosure remedies do not constitute the retroactive private relief condemned by *Heater.*

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I concur in sections I, IIB, IID, IIF and III of the Commission decision in this case. In addition, I concur in all aspects of the Final Order. Because I conclude that the Massachusetts Board of Registration in Optometry ("Respondent" or "Board") has engaged in unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, I do not reach the question of whether respondent has engaged in unfair methods of competition.

The Commission's Unfairness Jurisdiction

The Commission was granted specific jurisdiction over "unfair or deceptive acts or practices" in 1938 when Congress enacted the Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938). Since that time, this unfairness jurisdiction has played an integral role in shaping the Commission's pro-consumer mission. Indeed, the unfairness jurisdiction has been an important basis for the Commission's law enforcement efforts in both individual cases[1] and in trade regulation rules.[2] [2]

Consumer unfairness is not defined precisely by statute. Rather, its meaning has evolved over a fifty-year period, with governing standards gleaned from the case law and rules. The basic premise underlying this broad grant of authority to combat unfairness is to protect consumers from coercion, the suppression of important information or similar practices.[3]

The framework for analyzing whether or not challenged conduct is an unfair act or practice was synthesized by the Commission in its 1980 policy statement on the scope of consumer unfairness jurisdiction. *See* FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 (Dec. 17, 1980) (hereinafter cited as "Unfairness Statement"). The Unfairness Statement focuses primarily on two criteria in order to [3] demonstrate the existence of legal unfairness: substantial consumer injury or the violation of established public policy.[4]

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[1] *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

[2] *See, e.g.*, Trade Regulation Rule on Credit Practices, 16 C.F.R. §§ 444.1–.5 (1988) (prohibiting various credit practices); Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 16 C.F.R. §§ 456.1–.9 (1988) (requiring optometrists to provide consumers copies of their lens prescriptions); Trade Regulation Rule on Labeling and Advertising of Home Insulation, 16 C.F.R. §§ 460.1–.24 (1988) (requiring sellers of home insulation to provide specified product information in order to enable consumers to compare the efficiency of competing products).

[3] *See* Companion Statement on the Commission's Consumer Unfairness Jurisdiction Accompanying FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,951 (Dec. 17, 1980).

[4] As noted in the Unfairness Statement, these criteria were a refinement of factors first identified by the Commission in 1964 in its Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). The criteria also were cited with approval by the Supreme Court of the United States in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972).

To meet the consumer injury unfairness criterion, three tests must be met. First, the injury must be substantial. Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the practice produces. Finally, the injury must be one which consumers could not reasonably have avoided.

To meet the public policy criterion, the policy must be clear and well-established (*e.g.*, declared or embodied in formal sources such as statutes or judicial decisions). In most (if not all) matters, an act or practice that violates public policy will also cause substantial consumer injury. Accordingly, there usually is no need for separate analysis of the public policy criterion. Indeed, the Commission's Unfairness Statement correctly notes that the public policy criterion has been used by the Commission most frequently as a means of providing additional [4] evidence on the extent of consumer injury.[5] *See* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949.

Recent Applications of the Unfairness Statement

The Commission has adopted and applied the reasoning of the Unfairness Statement in its subsequent decisions. The first opportunity for the Commission to apply its then recently-issued Unfairness Statement to the facts of an adjudicated proceeding was in *Horizon Corp.*, 97 FTC 464, 849–52 (1981). In that case, the Commission found that a land sales company's retention of all sums paid in the event of buyer default was, under the circumstances, an unfair act or practice.

A unanimous Commission held that Horizon Corp.'s one-hundred percent forfeiture provisions enabled that firm to retain sums greatly in excess of any actual damages occasioned by purchaser default—thus satisfying the substantial injury test contained in the Unfairness Statement. The Commission also was unable to detect any countervailing benefits to consumers or competition [5] produced by the practice. Finally, the Commission concluded that the forfeiture clauses reasonably could not have been avoided by consumers who were unable to bargain over these clauses. Moreover, these clauses were contained in a contract that was adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.[6]

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[5] In light of the Massachusetts statute providing respondent only limited authority to regulate advertising, Mass. Gen. Laws Ann., ch. 112, § 61, it could be argued that respondent's acts or practices challenged in this case violate established public policy. After all, in enacting this statute, the Massachusetts Legislature declared that regulations which "limit competitive advertising relating to the price of consumer goods or services shall be void as against public policy." *Id.* However, because I conclude that respondent's acts or practices are covered by the consumer injury unfairness criterion, I need not reach the public policy criterion.

[6] The Commission in *Horizon Corp.* also found the company culpable under an unfair acts or practices theory based upon the firm's violation of public policy. The Commission cited the Uniform Commercial Code's unconscionable contract provisions as well as various specific federal and state statutes pertaining to forfeiture clauses as evidence of a developing public policy against provisions such as the one used by Horizon Corp. in its adhesion contracts.

In 1983, the Commission applied the consumer injury analysis to another land sales company's practices to find that firm in violation of the unfair acts or practices prohibition of Section 5. *Amrep Corp.*, 102 FTC 1362, 1644-46 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986). In that case, the Commission found that the consumer injury amounted to more than $200 million in one "development" alone and thus constituted substantial consumer injury. In addition, the Commission could identify no countervailing benefits stemming from Amrep Corp.'s misrepresentations. Finally, the Commission determined that non-sophisticated investors reasonably could not [6] have avoided consumer injury in the face of the sales tactics employed by Amrep Corp.

In *International Harvester Co.*, 104 FTC 949, 1060–62, 1064–67 (1984), the Commission again found a firm liable under an unfairness theory. In that case, the Commission found substantial consumer injury because the respondent's failure to disclose that certain of its gasoline-powered tractors were subject to "fuel geysering" caused serious personal injury and even death. With respect to the countervailing benefits test, the Commission determined that no benefit from the firm's nondisclosure was even remotely sufficient to compensate for the human injuries involved. Finally, the Commission found that consumers could not reasonably have avoided injuries because they were not informed by the company of the importance of certain precautions.

The most recent Commission decision to apply the analysis set forth in the Unfairness Statement was *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In *Orkin*, the respondent for several years had offered termite and pest control service contracts to consumers with guarantees for the lifetime of the treated structure as long as the consumer paid a pre-determined annual renewal fee. Despite the "lifetime" guarantees in the contracts, Orkin claimed its costs were rising and unilaterally raised the renewal fees. [7]

Once again, the Commission applied the three tests of the consumer injury criterion of the Unfairness Statement and concluded that Orkin's conduct constituted an unfair act or practice. With respect to the first test, the Commission found that the failure to honor some 207,000 contracts representing over $7.5 million in increased renewal revenue in an approximately four-year period constituted "substantial" consumer injury. 108 FTC at 362.[7]

On the issue of countervailing benefits, the Commission found that

[7] The Commission also specifically noted that the financial injury to each individual consumer was relatively small if measured on a yearly basis. Yet, the injury was deemed to be substantial because it did "a small harm to a large number of people." 108 FTC at 362.

consumers received nothing from the increase in annual renewal fees other than the additional burden of paying more for Orkin's services than agreed upon originally. The Commission also found that raising the annual renewal fee did not enhance competition. *Id.* at 364–65.

Finally, the Commission determined that consumers reasonably could not have avoided the injury. For one thing, Orkin's competitors did not offer similar "lifetime" price guarantees. Moreover, the Commission also held that mitigation of injury for Orkin's breach of contract by utilizing competing pest control companies might not be satisfactory. Consumers still would incur transactions costs in searching for reliable firms willing to [8] provide the same service on the same terms Orkin had offered in its original contracts. *Id.* at 366–68.

The United States Court of Appeals for the Eleventh Circuit recently affirmed the Commission's decision in *Orkin. See Orkin Exterminating Co. v. FTC,* 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In doing so, the appellate court accepted and applied the three tests developed by the Commission to determine whether the consumer injury criterion has been met. *Id.* at 57,937–40. For example, the court wrote:

> [T]he Commission's three-part standard does little to isolate the specific types of practices and consumer injuries which are cognizable. But "the consumer injury test is the most precise definition of unfairness articulated by either the Commission or Congress"; consequently, we must resolve the validity of the Commission's order "by reviewing the reasonableness of the Commission's application of the consumer injury test to the facts of this case, and the consistency of that application with congressional policy and prior Commission precedent."

Id. at 57,938 (quoting *American Financial Services v. FTC,* 767 F.2d 957, 972 (D.C. Cir. 1985)). In addition, the Eleventh Circuit concluded: "Thus, because the Commission's decision fully and clearly comports with the standard set forth in its Policy Statement, we conclude that the Commission acted within its section 5 authority." *Id.* at 57,940.

Analysis of Respondent's Conduct

The actions taken by respondent created conditions comparable to those at issue in three of the four previous cases that have applied the Commission's Unfairness Statement. These three cases (*Horizon Corp., Amrep Corp.* and *International Harvester Co.*) dealt with the failure of respondents to provide consumers with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product or service involved. Similarly, consumers here have not been provided with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product

or service involved. However, the case at hand differs from these preceding cases in two regards.

First, the Board itself has not failed to provide consumers with truthful and nondeceptive information concerning the purchase of optometric services. Rather, it has prohibited licensed optometrists from providing consumers with truthful and nondeceptive information likely to be relevant to consumers interested in purchasing optometric services. This difference, however, is not determinative.

The Commission, in prior cases involving its unfairness jurisdiction, has examined prohibitions on certain types of advertising by private associations of professionals. These private professional associations, like governmental state boards, do not themselves advertise specific prices and services to the public. Instead, they seek to regulate the advertising [10] practices of members of the associations, and sometimes impose sanctions on professionals who fail to abide by the established codes.

The preeminent case in this area is *American Medical Association,* 94 FTC 701, 1010–11 (1979), *aff'd as modified,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982) (order modified 99 FTC 440 (1980) and 100 FTC 572 (1982)). In that case, the Commission found that the American Medical Association's ("AMA's") code of ethics proscribed "almost all advertising and promotional activity" by physicians. *Id.* at 1004. The Commission concluded that the AMA's virtual ban had at least three adverse consequences on competition. First, the ban made it more difficult for consumers to locate the lowest-cost qualified physicians. Second, it isolated physicians from competition—including making it more difficult for new physicians to enter into direct competition with established physicians. Third, it also reduced the incentive for physicians to price competitively. *Id.* at 1005.

The Commission held that the AMA's advertising restrictions constituted both unfair methods of competition and unfair acts or practices within the meaning of Section 5 of the FTC Act. Neither of these bases for liability was disturbed on appeal. Thus, certain restrictions on advertising practices imposed by an organization may constitute unfair acts or practices just as a decision by individual entities not to advertise in certain circumstances may be an unfair act or practice. [11]

The second difference from the three previous unfair acts or practices cases cited is that respondent has invoked the coercive power of the Commonwealth to prevent the dissemination of information to consumers. This coercive power of the Board extends not only to preventing noncomplying optometrists from earning a livelihood in their chosen profession, but also to the ability to seek criminal sanc-

tions, including fines and imprisonment, for violations of its rules and regulations. Certainly, one would expect such coercive threats to deter many optometrists from using the types of truthful and nondeceptive advertising prohibited by respondent. The record shows in fact that the Board's regulations and its enforcement of those regulations reduced the dissemination of truthful and nondeceptive information to consumers (IDF 117–32, 134–46, 150, 152–54, 159, 172–75).

This second difference also is not determinative. As discussed in more detail below, respondent has proscribed truthful and nondeceptive advertisements in contravention of the law of Massachusetts. The Board, therefore, has not acted within the scope of its mandate with respect to these regulations. Accordingly, it has forfeited its claim to preferential treatment relative to private associations of professionals that restrict their members.

Turning to the three tests of the consumer injury unfairness criterion, I address first whether the consumer injury that results from respondent's acts or practices is substantial. The **[12]** Administrative Law Judge ("ALJ") found that more than $100 million is spent on eyecare annually in Massachusetts (IDF 55);[8] that restrictions on advertising in the market for optometric goods and services raise prices and total costs to consumers without improving quality (IDF 62); that advertising has the effect of lowering the total cost, including out-of-pocket and search costs, of optometric goods and services (IDF 60, 65, 176, 178); that prices are lower for eye examinations and for optical goods in states where advertising is permitted than they are in Massachusetts (IDF 77–78, 177); and that the supply of optometric goods and services in Massachusetts may be lower than they would be absent the advertising restrictions at issue in this case (IDF 79). I agree with these factual findings and note that respondent does not challenge them. I therefore conclude that the consumer injury that results from respondent's acts or practices is substantial. **[13]**

The second test of the consumer injury unfairness criterion is whether the consumer injury is outweighed by any offsetting consumer or competitive benefits produced by the practice. Interestingly, respondent has not even attempted to justify its complete ban on discount advertising. Further, respondent has not proffered any ostensible offsetting consumer or competitive benefits that would justify its restrictions on advertising that uses testimonials or advertising

[8] The ALJ's Initial Decision does not specify what portion of this $100 million market is served by optometrists. However, in the unfair acts or practices discussion of its *AMA* decision, the Commission addressed the question of whether injury could be substantial where the dollar amounts of injury were not calculated specifically: "While it is impossible to quantify precisely how much of the aggregate annual expenditures for physician services represents consumer injury attributable to the challenged restrictions, we are convinced that the record in this case supports a finding of substantial injury." 94 FTC at 1011. This statement also holds true for the acts or practices of respondent given the size of the market and the potential consumer benefits from the prohibited advertising.

that the Board believes is sensational or flamboyant. Thus, as to the bans on discount advertising, advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant, the record does not show any offsetting consumer or competitive benefits. Consequently, I conclude that there are indeed no such offsetting consumer or competitive benefits.

Respondent has asserted that three "costs" are associated with affiliation advertising: (1) affiliation advertising is alleged to be "a species of false and deceptive advertising"; (2) affiliation advertising is alleged to "obfuscate the relationship between optometrists and retail optical establishments and simulate unlawful forms of optometric practice"; and (3) affiliation advertising is alleged to "enable commercial firms to exert undue influence over optometrists." (RAB at 74–82, 96–97.) The relevant questions are whether respondent has correctly identified costs of affiliation advertising, and if so, whether these costs outweigh the benefits to consumers to such an extent as to justify a complete prohibition of such advertising. [14]

As to these questions, I concur with the reasoning of the Commission decision that the truthful advertising of a lawful business relationship is not inherently deceptive. The wholesale prohibition of all affiliation advertisements here is not justified merely because some such advertisements may be deceptive.[9] I also agree with the Commission's conclusion that the respondent's "undue influence" argument is merely camouflage for a distaste for competition among optometrists.

In each of the types of advertisements cited by respondent there are far less restrictive ways to protect consumers from deceptive practices than to impose an absolute prohibition. Respondent has not explained why it needs to ban all truthful and nondeceptive advertisements simply because some advertisements may contain misleading claims. [15]

Respondent has every right, and indeed the obligation, to prevent the dissemination of false or deceptive advertisements. Unfortunately, respondent's broad restrictions are far more likely to insulate established optometrists from the rigors of competition than to protect consumers from deceptive optometric practices. Accordingly, I

[9] Indeed, respondent recognizes the benefits of affiliations. In its initial brief the Board states: "Referral relationships enable both optometrists and optical stores to offer their patients and customers, respectively, the convenience of 'one-stop shopping.'" (RAB at 79.) The Board also argues, however, that "even if some affiliation advertisements are not actually deceptive, they may be prohibited as an easily and often abused method 'to facilitate the large-scale commercialization which enhances the opportunity for misleading practices.'" (RAB at 78) (citing *Friedman v Rogers*, 440 U.S. 1, 15 (1979)). Respondent has failed to offer any record evidence that large-scale commercial chain optical establishments engage in misleading practices more frequently than other providers of optical goods and services. In fact, the ALJ found that no deceptive advertising complaints had ever been received by the Massachusetts Board of Registration of Dispensing Opticians against a chain and that no evidence was introduced to show that the Board ever charged any optometrists with false or deceptive advertising (IDF 47, 133).

conclude that the consumer injury caused by respondent's ban on the various types of advertising at issue is not outweighed by any offsetting consumer or competitive benefits.

The third test of the Commission's consumer injury unfairness criterion is whether consumers reasonably could have avoided the injury caused by the conduct. When consumers do not obtain sufficient information to make rational economic decisions, it is difficult, if not impossible, for them to avoid injury. The Unfairness Statement sets forth one indication of whether consumer injury is reasonably avoidable:

> Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. . . . Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act. **[16]**

Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949 (footnote omitted).[10]

An argument might be made that consumers could establish a clearinghouse for information about optometrists in Massachusetts, including which optometrists offer discounts and which are located near sellers of glasses and contact lenses. Such information gathering, however, is cumbersome and expensive. Moreover, optometrists might be concerned reasonably that any cooperation with the effort would be considered a violation of respondent's rules. Even if such a project were undertaken, dissemination of the findings to consumers of optical services would be costly and could become outdated quickly.

In *Orkin Exterminating Co.*, 108 FTC at 267–68, the Commission concluded that the costs of searching for suppliers of **[17]** services are germane to whether consumers reasonably could have avoided or mitigated the injury sustained from a respondent's acts or practices. The Commission's reasoning in *Orkin* is relevant as well to the search costs present in this case.

Alternatively, consumers could demand that the Board modify its rules to permit the dissemination of truthful and nondeceptive adver-

[10] The fact that the Unfairness Statement uses the word "sellers" rather than the phrase "state boards" does not render this passage inapplicable. First, as section IIB of the Commission decision points out, the Commission has jurisdiction over respondent. Second, four of the five members of the Board are sellers of optometric services and the fifth member has not participated in any Board activities since December 1982 (IDF 3). As sellers of optometric services, Board members have an incentive to regulate in a manner that enhances their ability to compete. Third, in its analysis in the Unfairness Statement, the Commission cited *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) as support for the proposition that the withholding of information is properly condemned as an unfair practice under the FTC Act. Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421, at 55,949 n.21. This citation to a case involving the Virginia State Board of Pharmacy (a state board analogous to respondent) provides some indication of the Commission's intent to construe broadly the term "sellers."

tising by optometrists. Failing that, consumers could seek to change the membership of the Board. But, these options do not seem realistic for at least two reasons. First, it would require consumers to embark upon a process that is arduous, time-consuming, uncertain and expensive at best. Indeed, according to "the logic of collective action," a few individuals with a great deal at stake often can out-organize and defeat a much larger number of people who collectively have more, but individually have less, at stake.[11]

Second, some other facts suggest that consumers may face an uphill climb. The Board consists of five members, four of whom are optometrists and the fifth is a public member who has not participated in any Board activities since December 1982 (IDF 3). In addition, both the Massachusetts Executive Office of Consumer Affairs, a cabinet office whose area of responsibility includes the Board, and the Massachusetts Department of the State Auditor have criticized the Board's advertising restrictions. It is unlikely that consumers would succeed rapidly where these two [18] arms of the Commonwealth of Massachusetts have failed (IDF 84–99).

In any event, it clearly is beyond the capability of an individual consumer, acting alone, to mount the types of concerted campaigns hypothesized above. The third test of whether consumers reasonably could avoid injury must be understood as an inquiry into individual options rather than group activism. To require more would stretch the qualifier, "reasonably," past the breaking point. Otherwise, one could always suppose some form of joint action that might suffice if taken to an extreme. For example, consumers in theory always could demand of a corporation that it change its unfair acts or practices, or seek to have its board of directors replaced. But such a standard illogically would place the burden of securing change upon the consumer victims and would allow the illegal practices to continue for the duration of any "reform efforts."

For all these reasons, I conclude that consumers reasonably could not have avoided the injury caused by respondent's conduct. In sum, then, respondent's conduct runs afoul of all three tests of the consumer injury unfairness criterion: the conduct has caused substantial consumer injury; the injury is not offset by corresponding consumer or competitive benefits; and the injury reasonably could not have been avoided by consumers. [19]

Respondent's Specific Arguments on the Unfairness Issue

Having explained why the respondent's conduct meets the legal standard for invoking the Commission's unfairness authority, I now turn to the three specific arguments raised by respondent in its ap-

[11] M. Olson, *The Logic of Collective Action* (1965).

peal.[12] These arguments are: (1) governmental regulatory bodies do not engage in acts or practices [**20**] as those terms are used in the FTC Act; (2) the state action exemption applies to the Commission's unfair acts or practices jurisdiction; and (3) the conduct complained of is not unfair because the Board has determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury.

First, respondent argues that governmental regulatory bodies do not engage in acts or practices as those terms are used in the FTC Act. Nonetheless, the Commission successfully has asserted jurisdiction over several state boards for allegedly engaging in unfair acts or practices. Since each of these cases was resolved by consent agreement, the issue of jurisdiction has never been litigated fully. *See Wyoming State Board of Chiropractic Examiners,* 3 Trade Reg. Rep. (CCH) ¶ 22,477 (FTC Jan. 13, 1988); *Rhode Island Board of Accountancy,* 107 FTC 293 (1986); *Wyoming Board of Registration in Podiatry,* 107 FTC 19 (1986); *Montana Board of Optometrists,* 106 FTC 80 (1985); *Louisiana State Board of Dentistry,* 106 FTC 65 (1985).

Respondent questions whether governmental bodies ever can engage in "acts" or "practices" within the meaning of the FTC Act. At the outset, I conclude (as does the Commission in section IIB of its decision) that governmental entities are encompassed within the meaning of the word "person" in Section 5 of the FTC Act. If the Commission has jurisdiction over governmental entities, then it may examine the acts or practices of those entities. [**21**]

In addition, Congress purposely avoided enumerating or defining unfair acts or practices in the FTC Act.[13] When the unfair methods of competition language was enacted, Congress carefully considered whether to prohibit specific abuses, rather than provide general guid-

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[12] When the Commission issued its Complaint against respondent on July 8, 1985, respondent was put on notice that the Commission was proceeding under both an "unfair methods of competition" theory and an "unfair acts or practices" theory. For example, paragraph 15 of the Complaint reads as follows:

> The combination or conspiracy and the acts and practices described above [in paragraphs 12 and 13 of the Complaint] constitute unfair methods of competition *or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act.*

Complaint, ¶ 15 (emphasis added). In addition, Administrative Law Judge Timony's Initial Decision specifically found liability on an unfair acts or practices theory, distinct from the liability he found under the unfair methods of competition theory. *See Massachusetts Board of Registration in Optometry,* Docket No. 9195 slip op. at 42–43 (June 20, 1986) (Initial Decision). Finally, both respondent and complaint counsel addressed this issue in their respective briefs before the Administrative Law Judge and the Commission. *See* Complaint Counsel's Brief in Support of Proposed Conclusions of Law, pp. 60–63 (April 28, 1986); Post-Trial Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–60 (May 9, 1986); Complaint Counsel's Reply to Respondent's Post Trial Brief and Proposed Findings, p. 21 (May 16, 1986); Appeal Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–61 (Aug. 8, 1986); Complaint Counsel's Answering and Cross-Appeal Brief, pp. 105–06 (Sept. 17, 1986). Therefore, the unfair acts or practices theory of liability properly is before the Commission.

[13] Indeed, the words "act" and "practice" are both defined broadly in dictionaries and are not defined so as to exclude the acts or practices of governmental bodies. *See, e.g., Webster's Third New International Dictionary* 20, 1780 (1976).

ance to the Commission. In explaining its decision, the Senate Commerce Committee wrote:

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). *See also* H.R. Rep. No. 1142, 63d Cong. 2d Sess. 19 (1914) ("It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case.").

This legislative history of the FTC Act indicates that governmental bodies may engage in acts or practices that are unfair. While Congress never addressed the specific issue, it [22] purposely drafted a broad statutory mandate that was to be expanded as warranted by new forms of conduct that ultimately injured consumers. The FTC Act contains several specifically identified industries that are exempted from its jurisdiction,[14] yet Congress never has precluded the Commission from prosecuting governmental entities.

Respondent's second argument is that its prohibition on truthful and nondeceptive advertising by professionals is exempt from scrutiny under the Commission's unfair acts or practices jurisdiction due to the state action exemption. The argument is made in conclusory fashion and no support is provided for it.

Assuming arguendo that the state action exemption applies to the Commission's unfair acts or practices jurisdiction, I conclude, for the reasons stated in section IID of the Commission decision, that the exemption is inapplicable on the facts of this case. The Massachusetts Legislature has not clearly articulated a state policy to install regulation and displace competition in advertising by optometrists. Instead, the Legislature has clearly articulated its insistence that a board, such as [23] respondent, shall not make "any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the prices, nature and availability of goods and services to

[14] Section 5 of the FTC Act excludes from the Commission's jurisdiction banks, savings and loan institutions, common carriers, air carriers and persons, partnerships, or corporations subject to the Packers and Stockyards Act. *See* 15 U.S.C. § 45(a)(2). In addition, Congress has proscribed the Commission's authority to use funds to study agricultural marketing orders or to study, investigate or prosecute matters related to agricultural cooperatives. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 393.

consumers the effect of which would restrain or lessen competition." Mass. Gen. Laws Ann., ch. 112, § 61 (1983). Any such rule or regulation promulgated by a board is declared "void as against public policy." *Id.*[15]

Respondent's final specific argument is that the restraints on truthful advertising are not unfair because the Board reasonably determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury. This argument already has been addressed, in part, in the discussion of the second test of the consumer injury unfairness criterion. I concluded there, and restate here, that the consumer injury caused by the Board's acts or practices is [**24**] not outweighed by any offsetting consumer or competitive benefits.

This response, however, is not a complete reply to the Board's argument. The Commission is not intended to merely substitute its view of what constitutes "the public health" for that of the Board. Under our federalist system, the Board has a valid and lawful interest in regulating the level of public health and safety. Indeed, it is proper for the Commission to display considerable deference to the decisions of state entities. A mere preference for a different outcome would not justify Commission involvement. But when the Board oversteps its bounds and imposes regulations that cause substantial consumer injury and do not demonstrably improve public health, the Commission has the authority and the responsibility to examine the acts or practices.

There may well be some advertisements where some optometrists deceive some consumers in some fashion. Yet, the possibility that optometrists may deceive consumers in some circumstances does not justify a complete ban on entire areas of advertising absent a showing that consumers will be harmed significantly by such advertising. Moreover, the record in this case is clear that price advertising, affiliation advertising, testimonials and flamboyant advertisements, when truthful and nondeceptive, serve to provide immensely useful information to consumers. The benefits of this information, thus, exceed the cost of whatever action the Board may have to take in those few [**25**] instances where optometrists disseminate false or deceptive advertisements.

Just because a state board asserts that its regulations are intended

[15] Neither respondent nor complaint counsel has briefed the issue of whether the state action doctrine applies to the Commission's unfair acts or practices jurisdiction. In *Amrep Corp.*, 102 FTC 1362, 1621–22 (1983), the respondent argued that because the relevant states had enacted their own land sales disclosure and registration statutes, the state action exemption precluded Commission action on the basis of its unfair or deceptive acts or practices jurisdiction. The Commission held that the state action exemption was inapplicable in that case because "[n]o question of conflict with federal antitrust laws is involved here." Therefore, it is possible that the state action exemption is inapplicable to the Commission's unfair acts or practices jurisdiction inasmuch as the jurisdiction does not arise from a federal antitrust law.

to improve public welfare does not necessarily mean that those same regulations comport with federal statutes. At least where, as here, the Board operates in defiance of state legislation, ignores the criticism of two different state agencies, and causes substantial, unjustified and unavoidable interstate[16] consumer injury, respondent's prohibition on the dissemination of truthful and nondeceptive advertising constitutes unfair acts or practices.

Conclusion

Accordingly, I join in the Commission's order on the basis of the Commission's unfair acts or practices authority. I express no opinion about the Commission's unfair methods of competition authority as it relates to this case.

Final Order

This matter has been heard by the Commission upon the cross-appeals of respondent, Massachusetts Board of Registration in Optometry, and complaint counsel from the Initial Decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm in part and reverse in part the Initial Decision. Accordingly, the Commission enters the following order.

I.

It is ordered,, That for the purpose of this order, the following definitions shall apply:

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in Massachusetts, or the imposition of a reprimand fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses,

[16] *See* IDF 56-59.

including contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112 §§ 66 *et seq.*, or any future recodification thereof, is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising information about the price of any optometric service or optical goods.

II.

It is further ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price or from otherwise engaging in price advertising;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any advertising that uses testimonials and advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any person or organization to take any of the actions prohibited by this Part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to be otherwise unlawful under Massachusetts General Laws, Chapter, 112, Section 73A, or any future recodification thereof.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Within sixty (60) days after the date that this order becomes final, institute procedures to repeal 246 C.M.R. §5.07(3), and complete such repeal within a reasonable time thereafter;

B. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;

2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and

3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

C. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

D. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, all documents and records containing any reference to any matter covered by this order.

Commissioner Strenio concurring.

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists, or other truthful price advertising;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

Pursuant to the Federal Trade Commission's order, the Board has undertaken to repeal 246 C.M.R. §5.07(3), which states, in part, that a "licensee shall not permit or

authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry."

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. §5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically M.G.L. c. 112 s. 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes', 'free advice', 'free consultation', 'consultation without obligation', or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

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Chairman
Massachusetts Board of Registration
in Optometry

IN THE MATTER OF

REDMAN INDUSTRIES, INC., FLEETWOOD ENTERPRISES, INC., SKYLINE CORPORATION, AND COMMODORE CORPORATION

VACATING ORDERS IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Dockets C-2640, C-2641, C-2642, & C-2643. Consent Orders, March 4, 1975—Vacating Orders, June 16, 1988

The Federal Trade Commission has reopened proceedings and vacated consent orders, (85 F.T.C. 309, 414, 444, & 472), issued in 1975 against four mobile home companies, concerning the companies' failure to perform warranty services within a reasonable period of time and required the companies to establish and maintain warranty-related complaint and service systems. The Commission ruled that it would be in the public interest to reopen the proceedings and vacate the consent orders.

ORDER REOPENING THE PROCEEDINGS AND VACATING CEASE AND DESIST ORDERS

Petitioners Redman Industries, Inc., Fleetwood Enterprises, Inc., Skyline Corporation, and Commodore Corporation have each filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and vacate the order issued against it on March 4, 1975, in Docket No. C-2640, C-2641, C-2642 and C-2643 respectively.

The orders in this matter and a rulemaking proceeding arose out of an industry-wide investigation of the mobile home industry initiated in 1972. That investigation revealed that a substantial number of purchasers of mobile homes encountered difficulty in obtaining warranty performance to remedy defects appearing in mobile homes after delivery and occupancy. It appeared that the primary cause of warranty nonperformance involved disputes between the manufacturer and dealer over which had the responsibility for the defective condition giving rise to the request for warranty service. Such disputes generally revolved around the question of whether the defective condition was the result of defective materials or workmanship, which is the manufacturer's responsibility under its warranty, or was the result of improper "set up"[1], which is usually performed by and is the

[1] The general practice of mobile home manufacturers has been to offer one-year warranties covering defects in materials and workmanship. Such warranties typically exclude "set up" from the scope of coverage. "Set up" involves preparing the ground (grading, compacting, etc.) at the home site, excavating foundation holes and filling them with concrete to make piers, setting blocks or jackstands on the piers, setting the home on the blocks or jackstands, leveling the home so it sets evenly on the blocks or jackstands, affixing the home to anchors in the ground by means of cables that hold it in place, and connecting utilities.

responsibility of the dealer. Although industry practice calls for the dealer to perform warranty service, that dealer will be reluctant to undertake repairs he deems to be the manufacturer's responsibility if there is a question as to whether he will be reimbursed by the manufacturer for such service.

Unfortunately, attributing responsibility for a defective condition is not always simple. A number of defective conditions, *e.g.*, roof leaks, sagging floors, buckling walls, and improperly fitting or misaligned windows, doors, and cabinets can be attributable to either set up or defective materials or workmanship. Where such conditions existed, disputes over responsibility frequently arose and warranty service often went unperformed until the question was resolved.

The orders issued against the petitioners endeavored to remedy this warranty service problem by requiring:

1. completion of warranty service within specified time limits;
2. inspection of homes by respondent or its retailers at the time of tender of possession;
3. reinspection of homes within 90 days of tender of possession;
4. correction by respondent or its retailers of any defect discovered in a home or its set up during reinspection;
5. written agreements between respondent and its retailers delineating their respective responsibilities for warranty and warranty related service;
6. monitoring by respondent of retailers' warranty performance through purchaser questionnaires, periodic on-site reviews of retailers' service facilities and personnel, and retailer reports to respondent regarding mandatory inspections and reinspection;
7. self-monitoring by respondent of its fulfillment of warranty obligations through detailed internal monthly reports by personnel responsible for warranty service to company officials;
8. establishment by respondent of a prescribed warranty complaint handling procedure; and
9. extensive record keeping.

The proposed mobile home rule and the provisional acceptance of the four mobile home consent agreements were announced at the same press conference on December 26, 1974. The mobile home rule, as originally proposed, was essentially identical to the provisions of the mobile home orders. The four respondents apparently were targeted for enforcement action on the basis of size. They were four of the larger manufacturers of mobile homes. Commission staff did not deem their practices any worse than those of the industry as a whole. J. Thomas Rosch, then-Director of the Bureau of Consumer Protection, stated at the press conference that the orders would be superced-

ed by any rule that was promulgated. This also appears to be the understanding of the respondents.

It later became apparent that there were serious flaws in the proposed regulatory scheme, and that the anticipated benefits consumers would derive from application of the proposed rule to the entire industry would be exceeded by the costs of implementing the proposed regulations. Primarily for this reason, the Commission terminated the mobile home rulemaking proceeding on November 19, 1986. The staff's cost/benefit analysis that demonstrated this flaw was based in large measure on data subpoenaed from Redman, Fleetwood, and Skyline. Petitioners argue that the cost/benefit analysis is a changed condition of fact that demonstrates that they are burdened with costly requirements that do not produce countervailing consumer benefits. This, they argue, places them at a competitive disadvantage and as a consequence is not in the public interest.

Petitioners also allege that regulation of this industry has changed significantly since the orders were issued. At the time the orders were negotiated, the mobile home industry and the manufacturer warranties assertedly received limited governmental review. The mobile home orders and the proposed rule were designed to remedy perceived problems that developed during the construction, transportation, and set up of mobile homes. Underlying warranty service problems stemming from the difficulty of attributing responsibility for a defective condition to the manufacturer or the dealer was the lack of uniform construction standards both with respect to the construction of the mobile home itself and its set up. However, petitioners argue, since that time the Department of Housing and Urban Development has promulgated regulations pursuant to the National Manufactured Home Construction and Safety Standards Act of 1974 ("Manufactured Home Act"), 42 U.S.C. 5401, *et seq.*, which protects mobile home purchasers by creating construction and safety standards for mobile homes.

In addition, petitioners argue that a number of states are regulating the industry. Seventeen states, accounting for almost one-half of all mobile home sales and one-half of the population of the United States, require that all mobile homes sold within these states be warranted by the manufacturer. Forty-one states, accounting for over 90% of mobile homes shipped, license or have bonding requirements which regulate mobile home manufacturers and dealers. In at least fourteen of these states, accounting for about 50% of all mobile homes, the licensing requirements are tied to warranty service. In addition, building codes in a number of jurisdictions now cover the set up of mobile homes.

Petitioners also argue that shortly after the provisional acceptance

of the mobile home orders, the Magnuson-Moss Act became law. It established requirements for express warranties and prohibited certain limitations on implied warranties. Warrantors must include in their warranties the products or parts covered by warranty, what the warrantor will do in the event of a defect or malfunction, what the customer must do to obtain warranty performance, and other disclosures. In addition, Magnuson-Moss creates a private right of action against a warrantor who fails to comply with any obligation under the Act for damages and equitable relief, and a provision allowing for the recovery of costs and expenses including attorney fees.

Finally, petitioners assert that mobile homes purchased using Veteran's Administration and Federal Housing Administration financing, two of the principal sources of mobile home financing, must be warranted by the manufacturer.

FINDINGS

The basic showing required of a respondent to reopen a proceeding and have an order modified or vacated is set out in Section 5(b) of the Federal Trade Commission Act, which reads in pertinent part:

"[T]he Commission shall reopen any such order to consider whether such order . . . should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part."

In addition to changed conditions of law or fact as grounds for reopening, the Commission will also reopen a proceeding if the public interest so requires. The additional ground is set out in Rule 2.51(b) of the Commission's Rules of Practice which governs the contents of requests to reopen:

"A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside in whole or in part, or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusive or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications of the rule or order."

Commission practice has been to keep orders and rulemaking proceedings separate. Orders are issued when violations of the Federal Trade Commission Act have occurred (in the case of a litigated order) or when the Commission has reason to believe violations have occurred (in the case of consent orders). Rulemakings, broadly speaking,

are proceedings to determine whether an industry-wide rule will benefit consumers and further the purposes of the Federal Trade Commission Act.

Here we have a situation which we believe is unique in Commission history in that the orders were explicitly and completely linked with the proposed rulemaking. Respondents were engaged in practices that were industry-wide and their practices were deemed no worse than those of the industry as a whole. It was because of this conjunction that the then-Bureau Director stated that the orders would be superceded by any rule that was promulgated; there is no indication that the Commission thought otherwise at the time. Moreover, it was fully anticipated by the Commission at the time that a rule embodying provisions substantially similar to those contained in the orders eventually would be promulgated. However, the Commission instead later determined to end the rulemaking proceeding based upon its review of a completed record. Under these unprecedented circumstances, we conclude it would be in the public interest to vacate these orders, which consisted substantially of the remedies contemplated and rejected in the rulemaking.[2]

Based on the foregoing, we conclude that petitioners have demonstrated that the public interest requires reopening each proceeding and vacating each order.

It is therefore ordered, That the proceedings be reopened and that the orders issued on March 4, 1975, in Docket No. C–2640, C–2641, C–2642 and C–2643 be vacated.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree that the petitioners have demonstrated that the public interest requires reopening and vacating the orders in Docket Nos. C–2640, C–2641, C–2642 and C–2643. I differ, however, from the majority's explanation of why such action is in the public interest.

Under the public interest standard of Section 5(b), a petitioner must demonstrate as a threshhold matter some affirmative need to modify or set aside the order. *See, e.g., Damon Corp.,* Docket No. C–2916, letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished). A showing that an order impedes competition is sufficient to meet that standard. *Control Data Corp.,* Docket No. 8940, letter to Steven J. Olson (April 22, 1988) (unpublished) ("Control Data letter"). The threshhold showing that the order impedes the petitioners' ability to compete has been made here. Compliance data obtained by subpoena from petitioners Fleetwood, Redman, and Skyline demonstrate that these orders im-

[2] We find it unnecessary to reach petitioners' arguments of changed conditions of law or fact and express no opinions on their merits.

pede their ability to compete by imposing costs on petitioners but not on their competitors. *See William H. Rorer, Inc.*, 104 FTC 544, 547 (1984).

Once the threshhold showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make that modification.[1] *See, e.g.*, Control Data letter at 8. Here, there appears to be no reason not to vacate the orders. These orders are essentially identical to the proposed industrywide trade regulation rule that the Commission declined to promulgate in 1986 because the Commission concluded that the proposed rule would not benefit consumers. Because these orders address the same practices and contain essentially the same provisions as the proposed rule, it is reasonable to conclude that these orders, like the proposed rule, do not benefit consumers.

At least two reasons support vacating the orders. First, as discussed above, the orders impose costs that place the petitioners at a competitive disadvantage. Second, the petitioners and the Commission assumed that these orders eventually would be superseded by a trade regulation rule that would impose the same requirements on all manufacturers of mobile homes. The Commission's decision not to promulgate an industrywide rule appears to have been completely unanticipated.

Because the petitioners have demonstrated an affirmative need to vacate the orders, and because the reasons in favor of vacating the orders outweigh the reasons against vacating the orders, I conclude that the petitioners have demonstrated that the public interest requires reopening and vacating each of these orders.

[1] This approach is similar to that followed by courts when they decide whether to modify final court orders. *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 114–15 ("[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong"); *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982).

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

*Commodities involved in dismissing or vacating orders are *italicized*.

INDEX*

DECISIONS AND ORDERS

* Pertaining to prohibited trade practices and affirmative corrective actions involved in Commission decisions and orders, as codified in 16 CFR Part 13.

Page

Page